THE CITIZEN AND THE LAW

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By

"SOLICITOR"

Author of "English Justice"

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" The matter does not appear to me now as it appears to have appeared to me then."

BARON BRAMWELL
(*in Andrews* v. *Styrap*)

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PREFACE

THE great majority of men and women are lucky enough to have no conscious contact with the law. Automatically they pay their taxes and observe the regulations which affect their daily lives. They are vaguely aware of irritation, reasonable and otherwise, at licensing restrictions and other similar matters. With most people it would make no difference at all to their behaviour if the more serious crimes were not illegal. Similarly, business could not be carried on if men were not usually honest. In fact, however, the law forms an iron framework, limiting all we do. By the long custom of civilisation we keep within it as a matter of course, just as we put on clothes. To be law-abiding has become, for the ordinary citizen, as much a matter of unconscious habit as breathing. Many men have, at one time or another, had occasion to employ a solicitor, or have had to serve on a jury or give evidence in a court. But it is surprising what a number of people have not even had this experience.

There are, however, a number of contingencies which may arise in the lives of ordinary people and may bring them acutely in contact with the law, in both civil and criminal matters. Just because of the novelty of the experience, the average man or woman is peculiarly helpless in such an event, and in some cases a hopeless mess is made before skilled assistance is obtained. Apart from this there are many branches of the law affecting ordinary life wherein some knowledge of the pitfalls and some general hints as to useful action to be taken may be of value. Legal textbooks

are useless except for the trained lawyer. Books of the *Everyman His Own Lawyer* type, excellent as some of them are, necessarily express themselves in general terms, and attempt to cover too wide a range. One object of the present work is to put the ordinary citizen on his guard in connection with things that may happen to anyone, and to give him some information on certain legal points that are obscure to the general public. It is, of course, impossible to deal practically with more than a few points, but the general principles and the attitude to be adopted are very much the same in most cases.

Throughout it must be remembered that the exact facts are of the greatest importance. Long ago a very experienced solicitor said to a class of students:

"You will have many difficult questions put to you by clients when you are admitted. To nine out of ten of them the real answer to the client is another question: 'What would twelve bloody fools like yourself say to it in a jury-box?'"

Law, in these days, is often obsolete. Formerly common law, which is in effect founded on general custom, governed most questions between man and man. The common law had a way of adapting itself to novel conditions, and it was interpreted by Judges who realised the necessity of this. But statute law, which now covers almost everything, at its best expresses, and frequently misrepresents, the views of a temporary majority of citizens as to what the law ought to be. Actually, of course, statute law is too often merely the result of the activities of an energetic minority. And, beyond this, we are bound by almost innumerable regulations having the force of law which are, for practical purposes, made by the officials of various State departments.

Anyone can think of instances of obsolete law actually in force. There was the twenty-mile speed limit for motor traffic and before that the law requiring

a man with a red flag to walk before the car. Only the other day I defended a motorist whose only previous conviction was for a breach of the red flag regulation. Our laws with regard to betting and gaming are quite obsolete, and so is our divorce law. It is easy for the student of history to see how and why it is that many of our laws are absurd. It is less easy for the ordinary man or woman to realise that if one or both parties to a contract of marriage have broken it, and both desire that it should be set aside, they must not agree together as to what is to be done, or the court may call it collusion, and refuse to grant a divorce. Nor can he or she understand that it is perfectly legal to send a bet by post or telephone to a bookmaker next door, but to drop an envelope in his letter-box oneself, or tell him on his doorstep, may result in a charge of aiding and abetting in a criminal offence.

There is often difference of opinion among the highest authorities as to what the law actually is. The Russell *v.* Russell case, decided by a majority judgment in the House of Lords, reversing the decision of the Court of Appeal, is a good example. Since that decision, incidentally, inferior courts have devoted a good deal of ingenuity to what is called distinguishing it. There has been equally great difference of opinion as to what is the best course to adopt in practice. For instance, a very eminent judge, Mr. Justice Wills, laid it down that an accused person who intends to rely upon evidence by way of defence should give that evidence before the committing justices. Mr. Justice Horridge, a judge of equal eminence, has expressed a contrary opinion. All that an unfortunate solicitor can be sure of in such cases is that counsel at the trial will inquire, in tones of pitying wonder, as to why he took the course he did.

There are a number of matters in which the safest course is reasonably clear. There are others in which

it is useful to know that there are pitfalls, although it may be difficult to avoid all of them. There are few criminals who regard themselves as such. A forger, in his own view, merely signs another man's name because it is necessary for him to do so. Embezzlers only borrow. I remember a questionnaire issued to a certain association which elicited the fact that 8 per cent. of the members were prepared to commit an offence under the Prevention of Corruption Act knowing it to be illegal, while a much larger proportion would have committed the offence unaware of its criminality, and apparently considering it to be a mere matter of business. There is truth in the saying of an old solicitor that the difference between a lawyer and a business man is that a lawyer knows when he is dishonest.

There are probably many mistakes in this book. I do not think they can mislead anyone and so far as they exist they are evidence of the care which is necessary for everyone who comes in contact with the law. This book is written for laymen, not for lawyers, and I have referred to a number of reported cases in the hope that laymen may be tempted to consult them for themselves. Should they do so they will realise not only the difficulty of giving a definite opinion as to law, but also that in modern times there have been men who would have been well able to debate with the old Schoolmen as to the number of angels who could dance on the point of a needle, or to discuss with Sir Thomas More as to whether cattle are repleviable according to the custom of withernam. Except in a few instances the case references are to the *English and Empire Digest*, in which the details as to all the various Law Reports will be found. It is hoped that this will be more convenient than giving any particular series of Reports, and it is certainly less cumbersome than giving all.

The law is neither "an ass" nor "the perfection

of reason". Too often, however, it represents the opinion of a dead majority interpreted by the last generation but one. In the House of Lords, on 27th February 1934, Lord Merrivale, lately President of the Divorce Division, proposed to make it an offence punishable by fine and imprisonment to supply a contraceptive to an unmarried person under the age of twenty-one. This was, however, too much for Lord Banbury.

I wish to thank my wife for her help, without which I should never have written anything.

THE CITIZEN AND THE LAW

CHAPTER I

GOING TO LAW

THE average Englishman has a sound and well-founded dread of litigation. In most cases almost any settlement is better than " going to law ". Notwithstanding this dread, the vast majority of cases come to the courts for decision because the parties themselves insist on fighting the matter out, not because their lawyers have instigated them to do so. I remember a striking instance of this which occurred soon after the war.

A miner and a small farmer, each belonging to a class as tenacious of its " rights " as any that has ever existed, owned adjoining fields. The miner claimed a right of way for his cows through his neighbour's land for twenty yards or so, into a road through a gate actually adjoining his own hedge. The miner had more than a hundred yards of frontage to the same road, and could, at no expense other than that of making a gate, have opened a way of his own within ten yards of that he claimed the right to use. There was also another gateway to the road from his field. One man took action against the other in the County Court. I forget the exact form the proceedings about the right of way took, but the legal point involved was made difficult by a question of " common

ownership " complicated by the land having been of copyhold tenure. The case was fought at length before the County Court Judge. The hearing lasted two days, and in the end the Judge, saying the point was one of great difficulty, decided against the miner. Without hesitation he appealed to the High Court, where one Judge was in his favour and one against, the appeal being accordingly lost. I tried to dissuade him from a further appeal, but after thinking it over he came to my office with five bundles each of twenty £1 notes, put them on the table, and said, " Get on with it; there's more where those came from." Accordingly we got on with it, and in due course the Court of Appeal decided against him. The undaunted miner came in again, not to grumble but to ask the probable cost of an appeal to the Lords. Notice of appeal to the Lords was actually given, but this was too much for the other side, and we arrived at a settlement. I suppose about £200 was spent by each side in disputing a right the value of which cannot possibly have been more than a pound or so. Yet this was in no way due to any encouragement from the solicitors on either side. One was irresistibly reminded of the episode in *Guy Mannering*, where Dinmont explains the dispute about boundaries to the lawyer Pleydell.

" ' And what difference does it make, friend ? ' said Pleydell. ' How many sheep will it feed ? '

' Ou, no mony,' said Dandie, scratching his head, —' it's lying high and exposed—it may feed a hog, or aiblins twa in a good year.'

' And for this grazing, which may be worth about five shillings a year, you are willing to throw away a hundred pound or two ? '

' Na, sir, it's no for the value of the grass,' replied Dinmont; ' it's for justice.' "

As a result of the advice which Pleydell gives, Colonel Mannering remarks:

"That fellow will scarce think of going to law," to which Pleydell replies:

"Oh, you are quite wrong. The only difference is, I have lost my client and my fee."

A hasty plunge into litigation is nearly always due to the client, although there are a few solicitors, of the Dodson and Fogg type, who encourage litigation. The great majority of lawyers, whether barristers or solicitors, do the best they can for their clients, regardless of their own immediate interests.

There is one golden rule for all prospective litigants. As soon as you see any risk of an action arising out of a transaction in which you are engaged, consult your solicitor at once. Don't expect him to hold your hand and tell you exactly what to do throughout, but get a general idea as to what snags there are in the law on the subject.

Broadly speaking, the course of any proceeding in the High Court with regard to any civil claim is that it begins with the issue of a summons of some kind, which is served on the other side. Then the Plaintiff, i.e. the person bringing the action, delivers a written or printed Statement of Claim, to which the Defendant replies with a Defence, there is in some cases a Reply by the Plaintiff, Notice of Trial is given, and the case comes on for trial at the Law Courts in London or at Assizes. There are various "interlocutory proceedings", but the layman is not concerned with them. The actual trial takes place before a Judge, with or without a jury, and the case for each side is conducted by a barrister or barristers, usually referred to as Counsel. The Statement of Claim, Defence and Reply, if any, are called the Pleadings, and, subject to the Court's power to allow amendments, the parties at the trial are not allowed to go outside what they have put forward in their pleadings. The pleadings are drawn by counsel.

In a case of any importance there are usually two

or more counsel on each side. There may or may not be a jury. The senior or leading counsel for the Plaintiff makes an opening statement of his client's case, and then calls his witnesses. He gets his information as to the facts from his brief, a written or typed statement of the facts, with copies of the pleadings, all relevant documents, and proofs of what the witnesses are expected to say prepared for him by the Plaintiff's solicitor. On this brief is written the counsel's name, and below it his fee, marked in guineas.

When each witness has been sworn he or she is examined as to the facts by the junior barrister. This is called examination in chief, and in this examination leading questions must not be asked. A leading question is one which suggests the answer to be given. A large number of people mistakenly suppose it to be one of an exceptionally searching kind. The leading counsel for the Defence cross-examines the Plaintiff's witnesses, that is, he asks them questions designed to test the accuracy of what they have said and puts the Defendant's version of the facts to them so far as may be necessary. Leading questions may be asked in cross-examination. Plaintiff's counsel then re-examines, to put right from his point of view, if possible, anything that may have been extracted in cross-examination.

This closes the Plaintiff's case and Defendant's counsel sometimes submits that the Plaintiff's case has not been made out. The Judge decides this point. If the case goes on Defendant's counsel opens his case and calls his witnesses, who are examined and cross-examined in a similar way to those of the Plaintiff. Counsel on each side then address the Judge or the jury if any, and the Judge either gives his decision or sums up the evidence and tells the jury the questions they have to answer. The Judge decides the law, the jury the facts. In future it is likely that juries will

seldom be used in civil cases. This will diminish the number of speculative actions.

If a prospective litigant has no solicitor, the best thing he can do is to ask his bank manager to recommend one. It is easy to go wrong in this direction. In most provincial towns every solicitor takes on everything that comes along, and some highly respectable conveyancing firms are not very efficient in litigation, though usually expensive. Above all, any solicitor with a reputation for sharp practice should be avoided, however " smart " he may be said to be. I have heard people say that they had gone to So-and-so instead of to their usual man, because So-and-so would be a match for the trickster on the other side. It never seems to occur to these people that it is much easier for So-and-so to exercise his talents for trickery on his own unsuspecting client than on the wary villain on the other side.

Having selected a solicitor, the client makes an appointment and goes to see him, taking with him, if he is wise, all the documents and accounts bearing on the case in his possession, and then leaves the matter alone until he is sent for.

During the intermediate proceedings the client does not as a rule see much of his solicitor, except that he is usually sent for shortly before the brief is prepared for counsel, partly so that his solicitor may obtain further information on any points which may have arisen, and often to prepare him for a possible settlement by emphasising the weaknesses in his own case. As a rule the lay client does not meet the barrister until what is called a conference is held shortly before the case comes on for trial. Most barristers have a special conference manner, comparable only to that of the head of a preparatory school when a new boy is introduced by its anxious parent. At this conference the difficulties of the situation are further impressed upon the anxious client, and he usually goes away

wondering how on earth he could ever have ventured to embark upon such a hazardous action.

Following this comes the worst time of all for the litigant. For a period varying from days to weeks he has to be prepared to throw aside all other business and dash off to the court on receipt of a telegram or a telephone message. It is not until nearly 4 p.m. on the previous day that a case is put in the list for hearing, and this may be a daily possibility for a considerable time. Once a case is put in the day's list for hearing the parties, their witnesses, the solicitors, and at least one counsel on each side have to hang about waiting for it to be called on, sometimes for a week or more.

It is important for the layman to remember that the solicitor who represents him in an action has an implied authority to compromise the action, and if he should do so bona fide the settlement will be binding upon the client unless express instructions to the contrary have been given and the other side are aware of them.

A client may have a right of action against his solicitor for settling against instructions, or for acting negligently, but this does not prevent the settlement being binding. Counsel has a similar power to compromise, but there is no right of action against counsel for negligence. Under exceptional circumstances the court may refuse to enforce a compromise which has been entered into, where grave injustice would be done by allowing it to stand, or where there has been a mistake.

The average layman is astonished, when the hearing begins, at the calm confidence with which his counsel proceeds to expound the very case as to the validity of which he has in conference expressed such grave doubts. Most people who have not had practical experience get their impressions as to courts and lawyers from Dickens, and there can be few better

guides. Even in detail there has been surprisingly little change since his time, except on technical points as to procedure. But every character in Dickens' books can be seen in and about the courts, the chambers of counsel, and the offices of solicitors, at the present day. Barristers' clerks are a class with whom, however, the general public are entirely unfamiliar. Between them and solicitors' common law clerks there exists the constant warfare of the seller and the buyer as to the amount to be marked on the briefs which are delivered. Although they have no theoretical knowledge of the law, long experience of the courts, and especially of the personal peculiarities of judges and counsel, give barristers' clerks an uncanny gift of prophesying the probable outcome of a case once the hearing has begun. Partly this is due to the fact that barristers' clerks undoubtedly talk things over between themselves, and have a pretty shrewd idea of what their principals on either side think about the chances of their respective clients. I do not think the barristers themselves ever profit by any hint of what is known. The standard of honour among the bar is high, especially in this respect. But it is seldom that a barrister's clerk is surprised at the result of a case.

In London cases almost always receive full and careful attention. It makes some difference by which judge a case is tried, but this is inevitable so long as judges are human. The presence of numbers of counsel, some of them as eminent as the judges themselves, is an effective safeguard against irregularities. There is still a good deal of talk about So-and-so having the ear of such-and-such a court, but not so much as there used to be. One hears a good deal of gossip about influencing judges from persons who affect to be, and possibly are, well informed. Personally I do not believe it, but I am merely one of the general public. At Assizes, however, remarkable

things happen, especially towards the end when cases have to be got through somehow. It sometimes happens that no counsel are in court except those actually engaged in the case which is being heard and under such circumstances I have seen and heard things which I would not have believed had I not been present.

At Assizes, too, it is possible to do something in the way of stage management. I remember many years ago being concerned for the defence in a case of wrongful dismissal. The defendant had rather a lot to explain away, and everything turned on whether his evidence was fully accepted. The Judge was a very strong churchman, and to my surprise the defendant, who had hitherto successfully concealed his ecclesiastical tendencies, appeared in the witness-box wearing a good-sized bronze cross which was, I believe, the emblem of some Church Society with which the Judge was prominently connected. The defence won. I have always attributed the cross to a very experienced clerk who was in charge of the witnesses, but I may have been wrong. As Mr. Perker said to Mr. Pickwick after a pretty exhibition of stage management in the case of Bardell *v.* Pickwick,

"Very good notion that indeed. Capital fellows those Dodson and Fogg; excellent idea of effect, my dear Sir, excellent."

The average layman usually shares Mr. Pickwick's astonishment and disgust at the extreme friendliness displayed between the counsel and solicitors representing him and those on the other side. He need not worry, for the rivalry of the bar is of the keenest. In the lower courts solicitor advocates have to take precautions against this frame of mind. I remember at one time another solicitor and I used often to travel together by train to an outlying court. On the journey we used not infrequently to exchange notes on our cases so as to save time at the hearing. When

we left the station, however, we used to walk on opposite sides of the street of the little country town, lest our respective clients should be suspicious. A year or two ago another solicitor having found that some of his clients thought he was too friendly with me in the " Police Court ", we arranged to stage a " scene in court " at the next opportunity. This was carried out with such realism that the Chairman of the Justices, who happened most unfortunately to be a lady as touchy as most other Labour representatives, told an official that she thought it was disgraceful that Mr. Blank and Mr. So-and-so should take advantage of a woman being in the chair to air their private differences. I asked the official to tell her that we had shared a taxi to another court immediately afterwards, but I don't suppose she believed it.

I have always thought that when the decision of any court is upset by a higher court on appeal the costs of both parties should be paid by the State, so far as the appeal is concerned. It is obviously unfair to ask either party to pay for the mistake made by a State official before whom they are forced to bring their case for a decision. That the party immediately or ultimately unsuccessful should pay the costs of the first hearing is reasonable, but not that they should pay anything further, unless the court below is upheld on appeal. Take the case of Russell *v.* Russell. The point on which the decision ultimately turned was one of law, as to whether or not certain evidence was admissible. The first hearing was before Mr. Justice Hill and a special jury. The jury found that the wife had committed adultery, but certain evidence was admitted though objected to. The evidence was that of the husband to the effect that he had not had marital intercourse with his wife at any time during the period within which the child which was born must have been conceived. Mr. Justice Hill ruled that the husband's evidence was admissible, and following the jury's find-

ing of adultery he pronounced a decree nisi. The wife appealed. A strong Court of Appeal unanimously approved the decision of Mr. Justice Hill, and dismissed the appeal. The wife appealed to the House of Lords and by a majority of three to two the House of Lords allowed the appeal. The result therefore was to settle the law in accordance with the view of Lords Birkenhead, Finlay and Dunedin, as against that of Lords Sumner and Carson, Lord Sterndale, Master of the Rolls, Lords Justices Warrington and Scrutton, and Mr. Justice Hill. Apart from their numerical advantage there can be little doubt that the six judges were generally held to be more learned in the law than the three on the other side. Incidentally, it should be clearly understood that the question was not whether the verdict of the jury was right or wrong, but solely whether the evidence of the husband was or was not admissible. His evidence would, according to the decision, have been equally inadmissible to prove that he was in another country at the time, and the result of Russell *v.* Russell has been that grave hardship has been inflicted in very many cases. I am now concerned, however, with the unfairness of compelling the parties to pay the heavy expense of putting right what, according to the decision of the House of Lords, was Mr. Justice Hill's mistake.

In considering a point of law one must bear in mind that inconsistent imbecility is by no means infrequently found in Acts of Parliament, and especially in the Rents Restriction Acts. A pretty point as to the meaning of the expression " tenant " was decided two or three years ago. It was settled that, although when a " statutory tenant " died intestate leaving a widow who was residing with him at the time of his death the widow was entitled to continue the tenancy, if the deceased left a will the unfortunate widow had no rights, even although her husband might have tried to pass everything to her. Before the point was

settled there was a dictum of one judge in favour of the widow, a dictum of another judge against her, and a decision of the Court of Appeal which expressly shirked the point. I remember arguing the point in the County Court, but on the Judge's suggestion we arrived at a settlement. A solicitor is usually expected to be able to give a definite opinion on any point of law upon which his advice is asked. It is only counsel who are permitted doubts and uncertainty.

Generally speaking, however, the law is comparatively easy to ascertain. It is the facts that present the difficulty. At the time of writing I have just delivered a brief in a case which depends entirely upon whether my client's story is believed or that of the plaintiff. There do not appear to be any witnesses, and the documentary evidence can be explained in either direction. The difficulty in such cases is to convince the ordinary man that he may not be believed. The average layman has a pathetic belief that truth is always victorious. When evidence is given in open court truth wins more often than not, but I should not care to suggest the exact proportion.

I have seldom known anyone, even though successful, who did not feel, when an action was over, that it would have been better not to embark upon it, whatever the terms of settlement might have been. Litigation is like war, except that victory is not worse than defeat. The question of the cost of litigation is a very difficult one. As Mr. Justice Mathew said many years ago, " In this country justice is open to all —like the Ritz Hotel." But, whether desirable or not, it is improbable that litigation can ever be really cheap.

The difficulty about cheaper litigation is that it will always be expensive to ascertain facts. Once these are proved, to get a decision as to the law is not as a rule expensive. This is shown by the comparatively low cost of an appeal to the Court of Appeal, which is usually somewhere about a sixth of that of the first

hearing. Attempts have recently been made to reduce the expense of litigation by enabling a judge to order that particular facts may be proved by affidavit, and that the number of expert witnesses may be limited, but facts have to be ascertained, and the New Procedure Rules will have more effect in reducing " Party and Party " than " Solicitor and Client " costs.

As a rule the costs of the successful party in an action have to be paid by the loser. The usual order for costs is, however, far from affording an indemnity to the winner, for the costs chargeable against the other side, known as " Party and Party " costs, are considerably less than those allowed as between Solicitor and Client. The fuller amount is sometimes, but not often, ordered to be paid by the loser. It is obvious that there are many items which are properly chargeable by a solicitor against his own client but which it would be unfair to compel the other side to pay.

Costs are usually taxed; that is, they are gone through, item by item, by an official who allows or disallows the various amounts in accordance with certain rules, or sometimes at his own sweet will and pleasure. Complaint is often made as to the amount of legal costs relatively to the damages recovered or the value of the subject-matter of the action, but the complaint is ill-founded. The expense of proving facts does not vary in proportion to the importance of the point involved. It is just as expensive to ascertain the truth about a collision between two worn-out lorries as if they were a couple of Rolls-Royces, although as a rule less will be spent on the former question.

It is impossible to say much about the proportion of expense attributable to counsel, solicitors and witnesses as these matters vary enormously, not only according to the class of case, but also in actions of a similar nature. As a matter of interest, however,

I have analysed the costs of the plaintiff in an action in which I was recently concerned. They were taxed as follows:

	£	s.	d.		£	s.	d.		£	s.	d.
Solicitors' Costs.	151	8	6	Taxed off	19	2	6	Allowed at	132	6	0
Counsel's Fees .	136	10	0	„ „	48	6	0	„ „	88	4	0
Witnesses' Allowances . .	24	0	0	„ „	1	10	0	„ „	22	10	0
Court Fees .	12	9	0						12	9	0
Sundry Disbursements . .	4	6	6						4	6	6
	£328	14	0		£68	18	6		£259	15	6

This action was tried at Assizes and was for slander. Had it been heard in London counsel's fees would have been lower and witnesses' expenses higher. The amounts taxed off would almost certainly be allowed on taxation as between solicitor and client, and in addition there were other items properly chargeable. The solicitors' costs of £132 6s. can roughly be attributed as to £50 to obtaining evidence, £34 for instructions to counsel, and the balance for interlocutory proceedings of various kinds. Incidentally the plaintiff's costs in the action of Bardell *v.* Pickwick were £133 6s. 4d., a more reasonable sum than might have been expected in view of the reputation of Messrs. Dodson & Fogg. It must be remembered that two competent counsel were engaged, and the solicitors must have gone to a good deal of trouble in obtaining the full instructions as to the facts which they had obviously embodied in the briefs.

It was presumably of this difference between solicitor and client and party and party costs that Mr. Perker was thinking when he told Mr. Pickwick, with reference to Mrs. Bardell's imprisonment, that he could only rescue her "by paying the costs of this suit—both of plaintiff and defendant—into the hands of these Freeman's Court sharks". It is clear that the defendant's costs, in the ordinary sense, were due to Mr. Perker, but Mrs. Bardell's party and party costs,

which were due from Mr. Pickwick, might in effect be called the costs of the defendant, and in addition there would be charges against Mrs. Bardell which would not be legally recoverable from Mr. Pickwick and might thus be described as the costs of the plaintiff. Dickens is almost always right in substance in legal matters.

From the point of view of the general community there are two sides to the question of cheap and easy litigation. Going to law wastes time, causes ill feeling, and hinders business, and it may be desirable that litigation should be discouraged by making it expensive even for the winner. It is better that people should settle their disputes by mutual concessions if this is in any way possible. On the other hand, expensive litigation, especially when it can be made expensive even for the winner, may be made an instrument for the oppression of the poor by the rich, and I have often met with instances of this.

Many a small business man has been forced to give way when knowing himself to be in the right because of his knowledge that the expense of litigation would be too great for him even although he were successful. Now that juries are less used litigation is less of a lottery, but it would be idle to pretend that a case can be presented as well at a low as at a high cost. It is true that counsel who are fashionable merely because they have appeared in some notorious and fully reported case are not as a rule worth the fees which they command. But there are certain natural gifts in the presentation of a case which are rare and have a scarcity value which is very high. These special qualities not infrequently enable an advocate to win cases which ought to be lost. In a perfect system of justice there would be no room for great advocates. Does anyone suppose that Sir Edward Carson, Sir John Simon, Lord Birkenhead, Lord Reading, Sir Edward Marshall-Hall, Mr. Norman Birkett

and Sir William Jowitt, to name only a few at random, made their great names as advocates by winning cases which would have been won in any event, whoever had appeared?

It is often suggested that fusion of the two branches of the legal profession would reduce the expense of litigation. I do not think there is much ground for supposing that it would be so. The distinction corresponds to a real difference in function, and is, I believe, preserved in practice in the United States, where fusion exists. In the County Courts, where counsel and solicitors have an equal right of audience, the ridiculous position exists that in all but minor cases a solicitor can charge about five times as much for briefing counsel and watching him take a case as by conducting it himself in person. In addition to the extra profit the solicitor is relieved of responsibility. It is scarcely surprising that under these circumstances counsel are usually briefed.

One of the difficulties in the way of all law reform is that the administration of justice is so much centralised in London that the fact that the majority of litigants live elsewhere is forgotten. The New Procedure Rules, for instance, ignore the fact that there are very many places in the provinces where there is either no local bar, or else it is difficult to get hold of a competent junior counsel to settle pleadings quickly.

Those who think that the cost of litigation can be very much reduced should reflect that if the remuneration of counsel and solicitors is reduced it is inevitable that an inferior class of man will have to be employed. There is no considerable social distinction attaching to the professions to compensate for small financial rewards.

Should anyone be interested in the general subject of the reform of the administration of civil, as distinct from criminal, justice, he can with great advantage read Mr. Claud Mullins' book *In Quest of Justice*.

It is important to remember that many more things may give rise to an action at law than the average layman realises. *Halsbury's Laws of England* (2nd edition, p. 9) says:

"The general rule is that wherever there exists a 'right' recognized by the law, there exists also a remedy for any infringement of such right; in the words of the old maxim, *ubi jus, ibi remedium*. Such an infringement of a legal right is known to the law as *injuria*."

Although there are a number of instances in which actual damage must be proved to show that *injuria*, in the legal sense, exists, there are many matters in respect of which an action may be brought although there is no damage to the claimant. One of these is trespass to land. The fact that ordinary trespass to land is not a criminal offence is now so widely known that many people are surprised to find that it is nevertheless actionable in the civil courts without proof of actual damage.

It is also necessary to remember that there are many acts which cause damage which are nevertheless not actionable. The phrase applicable is *damnum absque injuria*. There was an amusing case illustrating this about fifty years ago. A house which for sixty years had been called "Ashford Lodge" had adjoining to it another house, which for forty years was known as "Ashford Villa". The owner of "Ashford Villa" changed the name of his house to Ashford Lodge, and the owners of the original Ashford Lodge claimed an injunction to restrain the defendant from doing this, alleging that the change of name had caused them great inconvenience and annoyance, and had materially diminished the value of their property. The action failed, the judge remarking that the mere fact of causing damage to the plaintiffs did not give them a right of action. (See Day *v.* Brownrigg, *English and Empire Digest*, Vol. 1, p. 30.) There was also a

case in 1477 illustrating the point. The note of the case says :

" Defendant claimed plaintiff as his villein and with force and arms lay in wait for him to take, imprison and use him as his villein so that he could not go about his business, whereupon plaintiff brought an action upon the case. Held : plaintiff had no cause of action, there being *damnum sine injuria*."

In effect the judges said more fool he that he didn't go upon his business, for neither the claim, nor the threat, gave a cause for action. (See *English and Empire Digest*, Vol. 1, p. 35.)

It may be of interest to refer to a few more cases. The first is the well-known case of Ashby *v.* White, decided in 1703, in which it was held that a person who has a right to vote for the election of a member of parliament may maintain an action against a returning officer for maliciously refusing to admit his vote, although the candidate for whom he tendered his vote was duly elected.

In a case heard in 1662 it was decided that an action lay for falsely and maliciously writing a letter claiming a woman as the writer's wife, whereby she lost the chance of a marriage with another man. (See Shepherd *v.* Wakeman, *English and Empire Digest*, Vol. 1, p. 25.)

The case of Wilkinson and Wife *v.* Downton (see *English and Empire Digest*, Vol. 1, p. 25) was an action in respect of damage caused by a practical joke. The defendant, who appears to have had a peculiar sense of humour, told a wife he had a message from her husband to the effect that the husband had been smashed up in an accident, and was lying at a house with both legs broken, and that she was to fetch him home at once. This was entirely false and was done as a practical joke. As a result of the shock caused by this message the wife became seriously ill, and it was alleged that her hair turned white. The husband

and wife sued the defendant for damages. Mr. Justice Wright, in giving judgment for the plaintiffs, said:

"The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff, i.e. to infringe her legal right to personal safety, and has thereby in fact caused physical harm to her. That proposition, without more, appears to me to state a good cause of action, there being no justification alleged for the act. This wilful *injuria* is in law malicious, although no malicious purpose to cause the harm which was caused, nor any motive of spite, is imputed to the defendant."

Later in his judgment Mr. Justice Wright gave an illustration of the way in which a judge distinguishes cases which he does not wish to follow. The lay reader can decide for himself as to which of the distinctions he regards as valid. It is necessary to quote at length so that the exact reasoning can be appreciated.

"It is, however, necessary to consider two authorities which are supposed to have laid down that illness through mental shock is a too remote or unnatural consequence of an *injuria* to entitle the plaintiff to recover in a case where damage is a necessary part of the cause of action. One is the case of the Victorian Railway Commissioners *v.* Coultas, where it was held in the Privy Council that illness which was the effect of shock caused by fright was too remote a consequence of a negligent act which caused the fright, there being no physical harm immediately caused. That decision was treated in the Court of Appeal in Pugh *v.* The London Brighton and South Coast Railway as open to question. It is inconsistent with an earlier decision of the Court of Appeal in Ireland (Bell *v.* The Great Northern Railway Company) where the Irish Exchequer Division declined to follow the Victorian Railway Commissioners *v.* Coultas, and it has been disapproved in the Supreme Court of New York (see Pollock on Torts). Nor is it altogether in

point, for there was not in that case any element of wilful wrong, nor was perhaps the illness so direct and natural a consequence of the defendant's conduct, as in this case. On these grounds it seems to me that the case of the Victorian Railway Commissioners *v.* Coultas is not an authority on which this case ought to be decided. A more serious difficulty is the decision in Allsop *v.* Allsop, which was approved in the House of Lords in Lynch *v.* Knight. In that case it was held by Pollock, C.B., Martin, Bramwell, and Wilde, B.B., that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damage as would sustain an action for such a slander. That case, however, appears to have been decided on the grounds that, in all the innumerable actions for slander which had occurred, there were no precedents for alleging illness to be sufficient special damage; and that it would be an evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpery or groundless actions. Neither of these reasons is applicable to the present case, nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and dangerous condition, and another person falsely tells him that his physician has said that he has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that the case might be one of criminal homicide; or that, if a serious aggravation of illness ensued, damages might be recovered. I think, however, it must be admitted that the present case is without precedent. Some English decisions are cited in Mr. Beven's book on negligence as inconsistent with the decision in the Victorian Railway Commissioners *v.* Coultas, such as Jones *v.* Boyce, Wilkins *v.* Day, Harris *v.* Mobbs. But I think that those cases are to be explained on a different ground,

namely, that the damage which immediately resulted from the act of the passenger or the horse was really the result not of that act, but of a fright which rendered that act involuntary, and which, therefore, ought to be regarded as itself the direct and immediate cause of the damage. In Smith *v.* Johnson & Co., decided in January 1897, Bruce, J., and I held that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock of fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. But that was a very different case from the present one."

In this case the damages awarded were £100 1s. 10½d., the 1s. 10½d. being for some railway fares.

In the case of Janvier *v.* Sweeney (see *English and Empire Digest*, Supplement 8, p. 4) the Court of Appeal expressed the opinion that the judgment in Wilkinson *v.* Downton was right. Janvier *v.* Sweeney was a case in which a private detective on the instructions of his employer (i.e. the private detective for whom he worked) tried to frighten a woman into producing some letters by pretending he was a detective-inspector from Scotland Yard, and that the woman was wanted, as she had been corresponding with a German spy. The woman was so frightened that she became ill from nervous shock, and it was held that she could recover damages both from the detective and his employer.

The interesting point as to whether an action lies against a clergyman for refusing to perform the marriage ceremony does not seem to be settled. It was suggested in the case of Davis *v.* Black (see *English and Empire Digest*, Vol. 1, p. 25) that the refusal might be actionable if malicious and without probable cause.

Those who contemplate going to law may well consider a case reported in *The Times* of 27th January, 1934. It is well settled that the Court will not interfere

with the verdict of a jury as to the amount of the damages awarded in an action for libel unless the Court is of opinion that no reasonable jury could have awarded it.

Lord Justice Scrutton, after hearing the arguments of counsel on behalf of the appellants and the respondents, said he was of the opinion that twelve reasonable men could have come to the conclusion which they did in this case.

Lord Justice Maugham, however, said that he had come to the conclusion that this was a case in which, on full consideration of all the facts, no twelve reasonable men could have awarded such an amount of damages.

But Mr. Justice Talbot agreed with Lord Justice Scrutton, and the appeal was dismissed. So that it would appear that the result of an action might well be doubtful, even though the jury were composed of men of the calibre of Lords Justice Scrutton and Maugham. We have already seen that there may be very considerable difference of opinion as to the law.

In a recent case a chemist owed a firm a debt of £3 11s. 4d., and paid it. The firm overlooked the payment and sued the chemist, who, when served, pointed out the mistake. The firm apologised, but in due course their solicitor obtained judgment for the £3 11s. 4d. against the chemist, who naturally enough did not appear at the court. The fact of the judgment was published in a county newspaper. Eight months later the chemist had the judgment set aside, and later he brought an action against the firm claiming (*inter alia*) damages for procuring the judgment. The chemist alleged that a falling off in his business was due to the judgment and its publication. It was held that there was no evidence of malice, and that the supposed damages were therefore irrecoverable, a decision which was probably unexpected by the chemist (see Corbett *v.* Burge Warren & Ridgeley Ltd., *English and Empire Digest*, Supplement 8, p. 6).

There is a sound maxim that *de minimis non curat lex*. In 1614 it was neatly applied against a quibbling defendant. The facts were that the defendant had sold to the plaintiff £52 worth of oats at 10s. 9d. a quarter. The plaintiff sued on the contract, claiming delivery of 96 quarters 6 bushels. The defendant pointed out that 96 quarters 6 bushels came to £52 0s. 0¾d. It was held by the court that the plaintiff's claim was good, as the difference was too small to be counted, "just as the odd hours are not accounted in the year, which has 365 days and 6 hours" (see Lastlow *v.* Thomlinson, *English and Empire Digest*, Vol. 1, p. 37). It is likely enough that Shakespeare may have listened to some similar case about the time he wrote *The Merchant of Venice*, although he did not get his plot from the courts. It must be remembered that the law usually regards infringements of a right as serious, even although little or no damage is sustained, as in the before-mentioned case of Ashby *v.* White.

Another maxim which has given rise to some interesting cases is, *Ex turpi causa non oritur actio*. It may be useful to the relatives and friends of intending murderers to know that if, for instance, a man murders his wife he cannot recover the amount due under an insurance policy on her life. The position is the same in the case of manslaughter. In fact, no person can obtain or enforce any rights resulting to him from his own crime, nor can his representative, claiming under him, obtain or enforce any such rights. This principle was laid down in the case of In the Estate of Crippen (see *English and Empire Digest*, Vol. 1, p. 40). It is, however, doubtful whether a murderer may not take a share under his victim's intestacy, and a person who is found guilty of murder but insane can benefit under the will or intestacy of the murdered person.

On similar principles it has been held that the publisher of a libellous or immoral work cannot maintain

an action against anyone publishing a pirated edition. As to what was considered "grossly immoral" as lately as 1916 see the case of Glyn *v.* Weston Feature Film Co. (*English and Empire Digest*, Vol. 1, p. 42). We have come a long way since then.

Complaint is often made that it is possible for a person to institute proceedings and carry on an action although it is obvious that he or she cannot pay the defendant's costs should the action be unsuccessful. It is well settled that poverty is no ground for requiring a plaintiff to give security for costs, although in actions of tort where the plaintiff has no visible means the action may be remitted to the County Court. Speculative actions are frequently brought in which the plaintiff or his solicitor knows that there is little chance of success, but knows also that the defendant or his insurance company will almost certainly pay something rather than incur heavy and irrecoverable costs in fighting the claim. The institution of "Poor Persons" actions in which costs are neither paid nor received unless by special order has done a good deal to diminish the number of speculative actions, but there are still a large number. The race of Dodson and Fogg is far from being extinct, and some of the so-called Legal Aid Societies have landed a good many poor plaintiffs in the unfortunate position of being liable for the costs of an unsuccessful action. Certain of the insurance companies make a practice of fighting weak claims brought by certain notorious firms instead of paying to save costs, and this is likely to have a good effect. To make poverty a ground for ordering security for costs might mean that it would only be necessary to ruin a man to prevent his having any redress. In cases of absolute ruin the "Poor Persons" procedure would be open to him, but there is often inability to pay costs where a person is ineligible as a Poor Person. To be admitted to sue as a Poor Person the intending litigant must be worth not more than

£50, or in special circumstances £100, excluding wearing apparel, tools of the trade, and the subject-matter of the proceedings, and must have a total income from all sources not exceeding £2, or in special circumstances £4 a week. There must also be reasonable grounds for taking, or defending, proceedings.

An action may be dismissed on the ground that it is frivolous or vexatious or where no reasonable cause of action is disclosed, but this power is exercised by the Court in plain and obvious cases only. If the Attorney-General satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without reasonable ground in the High Court or inferior Courts, the Court may order that no legal proceedings shall be instituted by such person without the leave of the Court. Such an order will only be made under exceptional circumstances, and does not apply to criminal proceedings.

Lastly, there is the decision in the case of Baker *v.* Bolton in 1808 (see *English and Empire Digest*, Vol. 1, p. 34), where it was held that a husband, who had brought an action for negligence whereby his wife was killed, could not recover damages for the loss of her society or for his mental suffering due to her death. In accordance with what had apparently been considered for many centuries to be the law, it was laid down that the death of a human being cannot be complained of as an injury.

The Fatal Accidents Act of 1846 (commonly called Lord Campbell's Act) altered the law so as to enable the executor or administrator of a person whose death had been caused by some other person's wrongful act or negligence to take proceedings for damages within twelve months after the death. If no such action is brought within six months, then, within the twelve months, the action may be brought by the persons for whose benefit the action could have been brought by the executor or administrator. The damages must

be based upon pecuniary loss, and a reasonable expectation of pecuniary benefit from the continued life of the deceased must be proved.

This statutory right of action is obviously limited, and in 1917 the question as to whether Baker *v.* Bolton was rightly decided came before the House of Lords (see *The Amerika, English and Empire Digest*, Vol. 1, p. 35). It was held that, whether or not the common law had been correctly interpreted by Lord Ellenborough in Baker *v.* Bolton, it was far too late to disturb the rule then expressed. The Law Lords, however, inclined strongly to the view that the decision was right in law, whether or not the principle was sound. One result of the rule is that although a master may recover damages for the loss of the services of an injured servant, he cannot recover if the servant is killed. A similar result ensues in the case of a father suing for the loss of his daughter's services. The Supreme Court of the United States, where the common law is the same as in England, accept the correctness of the decision in Baker *v.* Bolton.

The Court in the case of Jackson *v.* Watson & Sons distinguished Baker *v.* Bolton (see *English and Empire Digest*, Vol. 1, p. 35). A husband brought an action to recover damages for breach of warranty on the sale of a tin of salmon unfit for food, which had caused the death of his wife. The jury awarded him damages which included £200 for the loss of his wife's services through her death. It was held that the husband was entitled to recover the £200, as there was a cause of action, the breach of warranty, independently of the wrong causing the death.

The Lord Chancellor has appointed a Committee to consider the question as to how far revision of the law may be required, and among other matters he has asked them to report on the law as laid down in Baker *v.* Bolton.

It is sometimes suggested that it should be possible

to obtain the decision of the courts free of cost to the parties, and Mr. Justice Mathew's famous sneer that in this country justice is open to all, like the Ritz Hotel, is quoted in support thereof. So far as the criminal law is concerned there is much to be said for this proposition, and its justice has in principle been admitted in the Poor Persons Defence Act of 1930, and the more recent Act dealing with appeals from the Courts of Summary Jurisdiction. I have dealt with the point in detail in *English Justice*, pages 241 and 242, which anyone who is interested may consult.

The question of granting free litigation in civil cases is a very different one. The Poor Persons Rules provide free aid for litigants who have a reasonably good case and have very small or no means, but this system is worked at the expense of the legal profession, and it would be impossible, even were it desirable, to extend it on similar lines. Human nature being what it is, the amount of litigation would enormously be increased if it could be indulged in without expense to the parties. This would be undesirable, quite apart from the direct expense to the exchequer, for litigation is a great hindrance to business. The cost of litigation, as we have seen, is largely due to the difficulty and expense of ascertaining the facts, and it does not seem reasonable that the State should pay the cost of finding out the true position on questions of fact, especially as the confusion is often due to the fault of one or both the parties. By all means diminish the advantage of the rich over the poor as far as possible, but it is impossible to do away with it so long as rich and poor exist.

CHAPTER II

THE POLICE

It is hard to define the attitude of the ordinary citizen to the police. To the upper classes a policeman is just a uniformed official, differing in function but not otherwise from a commissionaire, an R.A.C. man, or a hall porter. To the middle classes, especially the lower middle class, a policeman is a rather unwelcome necessity, useful for keeping the working and criminal classes in order, but unpleasant in personal contact. No middle-class family are other than upset and annoyed to see a policeman coming to their door. The working classes regard the policeman in his unofficial capacity as one of themselves. In his official capacity they dislike him as a rule. The quasi-criminal classes, by which expression I mean those who live by means which are regarded by those practising them as illegal rather than morally wrong, look on the police as human beings very like themselves. I usually find that men engaged in street betting, the three-card trick and various forms of card-sharping have no doubt that the police generally are corrupt whenever corruption is safe. This in my experience is also the view of publicans and club officials, who evade the laws as to closing hours and betting. Possibly it is the attitude of prostitutes, brothel-keepers and the like, but in the provinces one has insufficient experience in such matters to attempt to generalise. In what I have said I am not trying to make a case against the police, but merely stating the facts as I know them. The criminal classes have no dislike

for the police as such although they may have grudges against individual policemen, just as a footballer might against some member of another team.

The sympathies of the crowd in a working-class district are almost always against the police when an arrest is made. This is in part due to the unpopularity of the betting laws which the police to some extent enforce and partly to a tendency to side with the underdog. In the industrial districts the attitude of the police during the " General Strike " has neither been forgotten nor forgiven. Police powers under the Emergency Regulations were far too wide and were in many instances exercised in an overbearing and unfair way. Had there been any magisterial check on these activities the position might have been different, but there was not. The result of these things has been that the working classes, who constitute an immense majority of the population, are dangerously near regarding the police in the same way as the Irish did the Royal Irish Constabulary. The proposals for the formation of an " officer class " among the police will intensify this feeling. In this country political memories are long. The formation of the police was originally opposed on the ground that it would put a standing army of the old type at the command of the executive. Suspicion of the Regular Army has died down. Non-intervention in civil disputes has become a tradition, and the evil memory of the Curragh episode has hardly shaken it. I remember during the " General Strike " a detachment of regulars had halted and were standing at ease outside a political club in an industrial town. A die-hard friend of mine said to one of the soldiers that he was very glad to see them. The soldier scowled at him.

" Are you, you ——," he said. " Well, this wasn't what I bloody well enlisted for." Which somewhat damped my friend's enthusiasm.

I have often been amused at seeing the change in

the attitude of a middle-class man towards the police after he has come in hostile contact with a constable in connection with, for instance, a motoring offence. As a rule nothing is too bad for him to say about a force which formerly he regarded as the stainless bulwark of the nation against crime and anarchy.

The average citizen often wants to know how he stands with regard to the police and their powers. The answer is usually difficult. The law itself is not simple, even when the facts are clear, and as a rule the ordinary man is helpless against the police when there is a conflict of evidence as to what has happened. Consider the question of arrest. According to Halsbury's *Laws of England*, arrest consists of " the actual seizure or touching of a person's body with a view to his detention ". There may apparently be arrest without actual touching if words of arrest are used and the person spoken to submits and goes with the officer. A private person as well as a police officer may arrest. The only person who can neither arrest nor order an arrest is the King. An infant under the age of seven years cannot lawfully be arrested, as it cannot be guilty of any crime, but no one else, except the King and foreign sovereigns, is exempt.

A police constable, like a private citizen, may, without a warrant, arrest any person whom he sees actually committing or attempting to commit treason or felony or committing a breach of the peace. If a person creates a disturbance in another's house a constable may be called to turn him out, but in the absence of a breach of the peace the intruder cannot be given in charge or arrested. If, however, the person being turned out resists by force he commits a breach of the peace, for which he may be arrested without a warrant. A constable is not bound to assist the occupier of a house to turn out an intruder, but he may lawfully do so. Any person whom there is reasonable ground for supposing to be about to commit an immediate breach

of the peace may also be arrested by a constable or a private person.

In addition to the powers of arrest which they share with private citizens, police officers, as peace officers, have certain further powers without a warrant. Incidentally, a peace officer does not, as sometimes supposed, necessarily mean a constable. Justices of the Peace, sheriffs and coroners, as well as certain other persons specially appointed, are peace officers. All officers of the peace may arrest on reasonable suspicion that a felony has been committed, whether in fact it has been committed or not. Peace officers may also arrest without warrant if there is reasonable ground for supposing that a breach of the peace is about to be committed in their presence.

It is the duty of a constable, or any other peace officer, on a reasonable charge of felony being made by a private person against anyone, to take the person charged into custody. If the charge turn out to be unfounded, the person making the charge, not the constable, will be responsible. Very roughly, the crimes of murder, manslaughter, robbery, burglary, housebreaking, rape, arson, larceny, embezzlement, forgery, making false coins, wounding with intent to cause serious harm, garrotting, malicious damage of various kinds, sacrilege and attempts or threats to do some of these things are felonies.

Various Acts of Parliament give further powers of arrest without a warrant. In some instances the power is given to private citizens as well as constables.

A constable may handcuff an arrested person who is, or threatens to be, violent.

It is generally safer to assume that a constable has the power to arrest anyone he chooses, and it is extremely unwise to interfere in any way, even by audible comment or appearing to take any special interest, when an arrest is being made.

The private citizen is in a weak position in case he

is arrested by the police. In the first place he has the initial difficulty of proving his innocence, which, except before a Judge or Recorder, he is almost always compelled to do. It is seldom a charge is dismissed by the Magistrates without calling on the defence. Should he have been wrongfully arrested his remedy in the ordinary course is against the officer who arrested him. This has been definitely settled by a judgment of the late Mr. Justice McCardie in the case of Fisher *v.* Oldham Corporation (L.R. (1930), 2 K.B. 364). In this case the police arrested the wrong man by mistake. The question was whether the Oldham Corporation were liable for the action of the Oldham Police in causing the wrongful arrest of the plaintiff and in wrongfully keeping him in custody, and Mr. Justice McCardie, after one of his characteristic reviews of all the authorities bearing upon the point, held that they were not. It is a difficult matter to establish that an arrest was wrongful, and as a rule an ordinary police constable is not in a position to pay damages and costs. I have been concerned in two recent cases of claims against the police for damages where persons had been wrongfully arrested. In each instance damages were awarded after the cases had been strenuously contested for the defence by counsel instructed by the local Town Clerk, with the result that heavy costs were incurred. In the first case the damages and costs were recovered, after a subscription fund had been opened for payment thereof to which I was informed local bookmakers made liberal contributions. In the second case a part of the amount due was received but the balance has proved irrecoverable. It appears unfair that local authorities should not pay damages in such cases, and it is not, I think, generally realised, that the only redress for what may be extremely serious damage is against the officer or officers actually concerned.

As a rule, the police are cautious in the use of their

extensive powers, and seldom make an arrest if it can be avoided. The motorist, however, will do well to remember the case of Trebeck *v.* Croudace (L.R. (1918), 1 K.B.D., C.A.). By Sec. 12 of the Licensing Act of 1872 a person drunk in charge of a carriage on any highway may be apprehended. A police sergeant arrested a taxi-driver on a charge of being drunk while in charge of a taxi-cab on the highway. The charge was dismissed, and the taxi-driver brought an action against the sergeant for (*inter alia*) false imprisonment. The jury found that the sergeant honestly believed the plaintiff to be drunk at the time he was arrested, and on this Mr. Justice Bailhache gave judgment for the defendant, and his judgment was supported by the Court of Appeal.

One of the few legal decisions known to the general public is Hatton *v.* Treeby (L.R. (1897), 2 Q.B. 452), which laid down that a constable has no power to arrest or stop a cyclist who is riding without a light. Not so generally known, however, is that a constable is required to arrest persons profanely swearing, if unknown to him, and to take them before a magistrate who is to convict on the officer's oath. This is under an Act of 1745. The direction to the justices would be unnecessary now. Should the person be known to the constable, he is to lay information against him. The Act (Profane Oaths Act, 1745) lays down a graduated scale of penalties, ranging from 1s. to 5s. It has been held that the penalty may be calculated according to the number of oaths, which might make golf even more expensive than it is already.

Even without a warrant a constable, or a private person, may break down the door of a house in order to prevent a murder being committed there and arrest the offender. Apparently outer doors may also be broken without a warrant in immediate pursuit of the offender when a felony or an affray has occurred. Admission must, however, in such cases be demanded

and refused. With a warrant, which is a written authority signed by a justice, doors may be broken to effect an arrest, after demand and refusal of admittance.

The obligation to assist the police in the execution of their duty when called upon to do so is usually put a little higher than is justified by the law. It is an offence punishable by fine and imprisonment to refuse to assist a constable in the execution of his duty if called upon when there is an actual or threatened breach of the peace and reasonable necessity for calling for assistance, unless the person called upon is prevented by physical disability or lawful excuse. But there must apparently be a breach of the peace, actual or threatened.

A frequent source of difficulty is in connection with police questioning. Except so far as giving a name and address in connection with certain matters, or furnishing information with regard to licences and similar things, the police have no right to require statements to be made or to demand answers to their questions. Under some circumstances they have no right to ask questions at all. I am not considering what a good citizen ought to do, but what his legal obligations are.

As a rule the police have no legal power whatever to compel any person to answer questions, even if, for instance, a murder has been committed, and the police are making investigations with regard thereto. Naturally, they are in the habit of bluffing with regard to their powers, and it is a common thing for a police officer to suggest that if a person will not answer his questions perhaps he will do so at the police station. Once a person is in custody a policeman has no right to put any question whatever to him with regard to the offence for which he has been arrested, and even if not in custody a person whom the officer has made up his mind to charge should not be questioned without first being cautioned. A common practice is to

arrest a person on some minor charge and question him with regard to the other matter as to which he is suspected. This is regarded by the police as perfectly legitimate.

In November 1933 the Court of Criminal Appeal quashed a conviction because a confession had been elicited by what was held to be a threat. Apparently during the course of an examination a police inspector said to the person being interrogated, " We are police officers, and we want to know " (see R. V. Goodwin, *The Times*, 14th November, 1933).

In *Malice Aforethought*, by Francis Iles, there is an interesting account of the manner in which a C.I.D. inspector and other officers question and subsequently take a statement from a man suspected of murder. There is the preliminary inquiry, at some length, by the Inspector, while he is, in the words of the first of the " Judges' Rules ", " endeavouring to discover the author of a crime ", and " putting questions in respect thereof to any person, whether suspected or not, from whom he thinks that useful information can be obtained ". Next comes the more formal visit of the three officers, at which Superintendent Allhayes asks Dr. Bickleigh whether he would like to make a statement, and adds the necessary caution in accordance with Rule 2, " Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions, or any further questions, as the case may be." The whole business of the taking down of the statement with its continual little suggestions by the police officers and their insistence that the taking of the statement, which began at 9.20 p.m. and finished at 3.10 a.m., should be carried through without a break notwithstanding the doctor's protest, is wonderfully well done. Anyone who wants to know what actually happens cannot do better than get *Malice Aforethought* and study it carefully. Of course a suspected person

of a lower social class would receive much less consideration.

The more irregular proceedings of the police in many other "detective" novels should not be taken as necessarily inaccurate. Many things forbidden by laws and regulations are done in practice. The police are severely handicapped in their investigation of crime by having no power to require information to be given. I can see no objection to the police being given the right to bring persons refusing to answer questions before a magistrate by means of a summons and to require such persons to give all information in their power in the magistrate's presence.

As showing the difficulties which may occur when information is given to the police a case which was heard at Devon Assizes may be referred to. It also illustrates the dangers which arise in connection with that extremely indefinite offence "Public Mischief".

A farm labourer told the police that he suspected a boy, who had brushed past him, of stealing his money. A few days after the complaint the labourer found the missing money in the lining of his waistcoat. The labourer was prosecuted for committing a public mischief. Mr. Justice Du Parcq directed the jury to acquit him, saying:

"If everybody who makes a mistake is to stand in the dock, that would be a public mischief if you like."

It often happens that the police know perfectly well who has committed, say, a certain burglary or housebreaking, without being able to produce a scrap of legal evidence against the man. The more serious crimes, other than murder, are seldom committed by first offenders, practically never by novices working alone. When a house is broken into, the police at once ascertain where the local criminals in that particular line were about the time in question. This generally rules out all but one or two. Inquiries are then made as to the movements of the possible authors

of the crime. If they were either in the neighbourhood or cannot prove that they were not, some evidence is obtained to justify an arrest, and the man is brought to the police station, usually after some preliminary questioning in which the Judges' Rules are not too scrupulously observed. Once in custody I may perhaps quote the remark of a certain judge that the atmosphere of a police station seems singularly conducive to confessions. The prevalent method of working backwards, of first finding the criminal, and then procuring the evidence on which to convict him, though almost inevitable in practice, is fraught with serious risk to innocent persons unless magistrates are as careful in the consideration of cases brought before them as judges and recorders are.

In general, the police are practical and sensible men. In their dealings with all matters other than definite and serious crime their policy, in at any rate all but the highest ranks, is that of the old Duke of Wellington, " the King's Government must be carried on ".

From the beginning of his service a policeman knows that he must depend upon himself to get through the difficulties with which he is constantly faced. As a rule he knows something of the people with whom he has to deal, and he has the advantage of coming from their own class or one in close contact with them. He knows the words and things that may provoke a fight and how to handle trouble of various kinds. He knows what to hear and what to ignore and though he may be fussy about rules and regulations in dealing with the middle classes he seldom makes the mistake of attempting an arrest which cannot be successfully carried through. I have no doubt whatever that bringing into the force any considerable number of men from a social class different from that from which the police are at present recruited would lead to trouble of many kinds. I know that men from

every walk in life and of every degree of education are already to be found in the police force. But they are there as individuals, and not as members of a class. Generally speaking, the tradition of what I may call the second-class public schools is that certain things are " done " and many more things are " not done ". These rules are rigid so far as they go, and admit of no exceptions. Their observance is regarded as an end in itself. I refer to the second-class public schools more particularly, for they depend on an acquired school etiquette, rather than upon family tradition and breeding. The average Etonian, for instance, would probably have much the same standard and outlook if he had been privately educated by tutors and never been to school at all. But men who have, sometimes with difficulty, acquired a certain code of behaviour find it difficult to modify it in any way without going to pieces altogether.

The best policeman is a pure pragmatist. I remember discussing the question of three-card-trick men at racecourses with one of the ablest police inspectors I have ever met. I had been defending some three-card-trick players who had been charged by a couple of enthusiastic young detectives with " playing a certain game of chance, to wit, the three-card trick, at —— Race Course, contrary to Sec. 3 of the Vagrancy Act 1873 ". The High Court have held that the three-card trick is a game of skill, not chance, and on this being pointed out the case was dismissed. When I was discussing the case the same evening with the inspector in question he expounded his own eminently practical attitude towards race-course tricksters. He explained that when he was in charge of affairs he always let them have a two or three hours' run without interference, so long of course as they confined themselves to the peaceable exercise of their various tricks. Then he politely suggested to them that they'd been given long enough to make

a living, and if they didn't go they'd probably wish they had. "I knew them, and they knew me," he said, "and I never had any trouble; but suppose I'd cleared them out at once. They've got to make a living somehow, and it's better they should make it out of the mugs who'd lose their money anyhow than take to serious crime and give us a lot of trouble."

The way in which the law in regard to the offence commonly referred to as "frequenting" is interpreted puts far too much power into the hands of the police, and not infrequently leads to injustice. The actual words of Sec. 4 of the Vagrancy Act 1824 with regard to the persons to be found guilty of this offence sound reasonable enough. They are as follows:

"Every *suspected person* or *reputed thief frequenting* any river, canal or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any place of public resort, or any avenue leading thereto, or any street, or any highway, or any place adjacent to a street or highway, *with intent to commit a felony.*" (The italics are mine.)

By the Prevention of Crimes Act 1871, Sec. 15, it is provided, however, that in proving the intent to commit a felony it is not necessary to prove any particular act or acts tending to show such intent, but a person may be convicted if it appears to the magistrates that from the circumstances of the case and general evidence of the bad character of the accused, that such intent existed. Further, by the Penal Servitude Act 1891, Sec. 7, "loitering" is added as an alternative to "frequenting". It has further been laid down by the Court of Criminal Appeal that a person may be a suspected person by reason of what he does at the time of frequenting, without any evidence of bad character or previous convictions (Hartley *v.* Ellnor, 117 L.T.R. 304). It is obvious that this gives a free hand for evidence to be given of "suspicious behaviour" by jostling persons in a crowd,

or similar incidents. It is hardly surprising that the Court of Criminal Appeal should have found it necessary to point out that the statute was not intended as a convenient method of charging persons against whom there was insufficient evidence for a charge of attempting an offence. Some months ago I defended a man who was charged with this offence (" being a suspected person unlawfully did loiter about in a certain street called —— Road with intent to commit a felony "). The evidence against him was that he was seen by a motorist standing about in a road about 11.30 p.m. He had words with the motorist as to what business it was of the motorist's what he was doing. The motorist, who admittedly had been drinking, went off to fetch a policeman and when they returned the man was still there and he was arrested and charged. He was in regular work, and had 29s. on him when arrested. His story was that he had been to meet his wife, whom he expected back after two days' absence, and, disappointed by her non-arrival, he had gone for a walk. His wife confirmed this so far as possible. Ten years ago this man, when a mere youth, had several convictions, one or two for larceny, but since his marriage he had reformed, and for ten years he had been a steady hard-working member of society. He was convicted, and fined 40s. The Chairman of the Bench was well over seventy years of age. This was not a case of an undefended man. The magistrates convicted notwithstanding that in a full cross-examination all the facts were brought out. Charitable persons, seeing that the man was likely to be soured for life, even if he did not relapse into a life of crime, helped him to appeal, and the conviction was set aside with costs to the successful appellant. This kind of thing often happens, but usually without appeal.

In practice the police can charge almost anyone with " frequenting " or " loitering " with intent to commit

a felony, and a charge of this kind almost certainly means a conviction unless the man can prove his innocence to demonstration and is of good character. The annual average of charges of frequenting has, excluding the war period, been well over 2000 for the last thirty years, and is not decreasing. As showing the way in which this charge is used, after the case to which I have previously referred in which the three-card-trick men were discharged the police inspector in charge of the prosecution said in open court that he did not propose to let the case end there, and that would not be the last of the matter. A few minutes later the men told me that they had been warned that if they went to the racecourse again on that or the following day they would be charged with " frequenting ". The only advice I could give them was to stay away.

The main trouble with the police is that they have been, and are, allowed to usurp the jurisdiction of the magistrates, and in effect to try the cases themselves, a police prosecution, if pressed, automatically ensuring a conviction. It is unfortunate that in many courts they are allowed to take control of the procedure, ordering witnesses out of court, telling them how to behave and calling on cases in any order they think fit. The law as to Courts of Summary Jurisdiction is that

" The room or place in which such justice or justices shall sit to hear and try any such complaint or information shall be deemed an open public court, to which the public generally may have access, so far as the same can conveniently contain them." (See Summary Jurisdiction Act 1848, Sec. 12 ; Summary Jurisdiction Act 1879, Sec. 20, Sub-sec. (1).)

Notwithstanding the clearness of the law, in some courts the police refuse to allow any member of the public to enter the court after the sitting has begun, however much room there may be. In other courts the

public are not allowed to enter during the hearing of a case, but have to wait until it is over. This rule is enforced under any circumstances, and not only to prevent noise and disturbance.

The practice of allowing police officers to appear as advocates has greatly increased in recent years, owing to the craze for economy. A policeman, as such, has no right to appear, but by laying the information or complaint he acquires such a right in summary cases. Before the war some attention was paid to the clearly expressed views of the High Court on the point of police advocacy. Such advocacy is now taken so much as a matter of course in most courts that it is worth while to quote the views of the High Court Judges.

The case of Webb *v.* Catchlove (see *English and Empire Digest*, Vol. 22, p. 396) was decided in 1886. A police superintendent appeared as advocate in a charge against a licensee of allowing his house to be used as the resort of prostitutes. In cross-examination a police witness was asked to disclose the spot from which he had kept observation on the premises. Most people will agree with what Mr. Justice Denman said in allowing the appeal, " No question could have been more relevant than that as to the spot from which the police officers had made the observations to which they had deposed," but the magistrates upheld the policeman in refusing, on the direction of the Superintendent, to answer.

The High Court made short work of the matter and in fact no attempt was made on the part of the police to justify what had been done. Mr. Justice Denman, in the course of his judgment, said that he " thought it a most unfortunate practice for police officers to be allowed to act the part of advocates in courts of justice. When witnesses they should be mere witnesses and not be allowed to take up the position of advocates ".

Mr. Justice Hawkins, in concurring, said that " he thought it a very bad practice to allow a policeman to act as an advocate before any tribunal, so that he would have to bring forward any such evidence as he might think fit and keep back any that he might consider likely to tell in favour of any person placed upon his trial ".

Mr. Justice Hawkins added that if the rule of law as to privilege put forward by the Superintendent could be allowed to prevail it would be just as well to allow no cross-examination at all to take place on behalf of a prisoner.

In Duncan *v.* Toms, decided in 1887 (see *English and Empire Digest*, Vol. 33, p. 338), Lord Coleridge, then Lord Chief Justice, said:

" In the general observations made in Webb *v.* Catchlove I should entirely concur. I agree that it is a bad practice for a policeman, being a general officer of the law, and one who ought to stand indifferent between the parties, to appear and act as an advocate in courts of justice. I entirely agree, and I entirely concur in the observations in that case against such a practice."

More recently, in 1910, in the case of May *v.* Beeley (see *English and Empire Digest*, Vol. 33, p. 335), Lord Alverstone, another Lord Chief Justice, said:

" As to police advocacy, I do not approve of it any more than other judges have done."

Stone's *Justices Manual* (65th edition, 1933, p. 1709) says that the strong expression of the High Court against the practice of police advocacy should be regarded. In practice the average magistrate would regard with horrified surprise the suggestion that there was anything improper about it, so quickly do ill practices establish themselves. In far too many courts chief constables and superintendents sit with the Magistrate's Clerk as if they formed part of the court, and they are allowed to interject comments and inter-

vene in the proceedings in a manner which would not be tolerated from any advocate. An incident which happened a few weeks ago illustrates the extent to which the present system of police advocacy has helped to establish the police as the enemies of the people. I had given an address at a club for the unemployed and in moving a vote of thanks a miner said, "Mr. —— is a lawyer, and as we all know, it's the lawyers that stand up for the poor men." This remark was obviously not "spoke sarkastik", and was received with prolonged applause. A Labour M.P. told me some years ago that this was the attitude of the working classes towards "Police Court" advocates.

The claims of the police to occupy a privileged position came before the High Court again on 22nd November, 1933, when Mr. Justice Macnaghten ruled that a police sergeant who had been subpœnaed as a witness in a civil action must produce a signed statement made to the sergeant by one of the defendants. In the course of the case his Lordship said:

"It must not be presumed that the Crown has any right to intervene in a private suit or that the court is in any respect the servant of the Crown. The judges of these courts, ever since the Act of Settlement, have been absolutely independent of the Crown. Their duty is to administer justice as between subject and subject and as between the Crown and the subject."

Another matter that might well be taken out of the hands of the police is the administration of the oath. The Chairman of the Justices, or the Clerk, is the appropriate person to administer the oath, but in practice this is usually done by a police officer standing by the-witness box. It constantly happens that a witness is upset by being sharply corrected if he fails to use the exact words of the form of oath. Actually there is no prescribed form of oath, the usual one being, "I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth, and

nothing but the truth." I have very often heard a witness sternly rebuked and made to repeat the oath because he or she put "the" before "Almighty God". I have known witnesses compelled to repeat the words three times and even oftener until they got it right. One court, for reasons known only to itself, uses the formula "The evidence I will give", instead of "shall give", and witnesses are continually confused by this peculiarity, which is always strictly insisted upon. The matter is a serious one, for the more unaccustomed the witness, the more important it is to avoid upsetting him or her.

Grave difficulties have arisen in consequence of the use of plain-clothes police. The case of Flying-Officer Fitzpatrick is an example of one kind of evil, the cases in which criminals have pretended to be plain-clothes police of another. They add to the possibilities of blackmail and corruption, and their use has been condemned by high authorities.

The police force is, on the whole, an excellent body. It would be better still if magistrates and the general public would realise that policemen are human, and therefore liable to error and other human frailties. In the interests, not only of the general public, but ultimately of the police themselves, it is to be hoped that the assumption of the perfection and infallibility of each and every individual constable will be abandoned by those in authority, whether in the Home Office, the higher ranks of the police, or on the bench.

CHAPTER III

PERSONAL VIOLENCE

KILLING a human being is always a serious matter, for, as was said in a case decided in 1727, " it lies upon the slayer to extenuate the fact of killing, which prima facie is always murder " (see R. *v.* Oneby, *English and Empire Digest*, Vol. 15, p. 769). There may be various excuses for the private citizen who kills another person. Unless death occurs before the expiration of a year and a day from the date of the infliction of the injury, the assailant cannot be convicted of either murder or manslaughter. The day the injury was inflicted is counted as the first day in reckoning the time.

A person who is attacked is entitled to defend himself, and to use such violence as may be reasonably necessary to do so, even to the extent of killing his assailant. There must, however, be a reasonable apprehension of serious violence to justify the use of deadly weapons, and an ordinary assault would not be sufficient justification. The person assailed should retreat as far as possible before using a deadly weapon. Not only the person attacked, but anyone else who is present, has a similar right to use force. For instance, where a son, believing that his father was cutting his mother's throat, shot and killed him, it was held that the killing was excusable (see R. *v.* Rose, *English and Empire Digest*, Vol. 15, p. 812). A question often asked is as to the circumstances under which a motorist will be justified in shooting a person who attempts to stop his car. The answer is that he will never be

safe in doing so. It is dangerous for a motorist even to drive on when an attempt is made to stop him in any ordinary way, for the chances are enormously in favour of the stopping being for a legitimate reason.

Most people will remember the case in November 1933 where a coroner's jury found a verdict of "justifiable homicide" in the case of a man who was killed by a revolver shot fired by a person who had been robbed. It must be borne in mind, however, that in that case there was no doubt that a serious felony had been committed in the presence of the man who fired, and it was reasonably clear that by no other means could the escaping felon have been arrested. Moreover, the man who fired swore that he shot at the tyres of the car, not at the man. The law as to firing on escaping criminals is as stated in Halsbury's *Laws of England* (2nd edition, p. 433):

"If a person whom an officer or a private person is legally attempting to arrest upon a charge of treason, or felony, or inflicting a dangerous wound, flees, and he cannot be otherwise arrested, he may be killed, and the homicide is justifiable."

The importance of there being no other available means of arrest must be emphasised. Moreover, there must be a genuine intention of arresting, and the felony must be a serious one. For instance, it was held in the case of R. *v.* Scully in 1824, that "a person set to watch a yard or garden is not justified in shooting anyone who comes into it in the night, even if he should see the party go into his master's hen-roost".

It is generally considered that a man is justified in shooting a burglar who is trying to break in, or anyone who is attempting to enter by open and unlawful violence, but it is not every attempt to enter that may be repelled in such a way. For instance, the use of excessive force against a mere trespasser might involve a charge of manslaughter, or even murder, if death resulted. And if the burglar were attempting to

break out and escape it would be extremely risky to shoot him, notwithstanding the law as to arresting escaping felons.

The difficult question as to whether a man is justified in killing an unoffending person to save his own life was answered in a strange and dreadful case which came before the courts in 1884. Lord Bacon, more than 300 years ago, suggested that if two shipwrecked persons got on a plank which could not support both, and one pushed the other off and thus drowned him, the homicide was excusable on the ground of necessity. Lord Bacon's view was not, however, supported in the case above referred to, in which the facts were shortly these. Three men and a youth were in an open boat on the high seas, a thousand miles from land, and without hope of rescue. After they had been eight days without food they killed and ate the boy, living upon his body for four days. They believed when they did so that they could not otherwise escape death by starvation, but it was held that they were guilty of murder (see R. *v.* Dudley and Stephens, *English and Empire Digest*, Vol. 15, p. 790).

To kill a person in a deliberately arranged duel has always been murder, but if persons fight on a sudden quarrel, even with deadly weapons, and one is killed, it is manslaughter and not murder, provided the fight is fair. To fight a duel or send a challenge for one is a misdemeanour punishable by fine and imprisonment, even though no injuries are inflicted or the challenge be not received. It may be doubted whether the prohibition of duelling is altogether a good thing. There can, of course, be no question as to the necessity of getting rid of the professional duellist, the man who possessed or acquired skill with sword and pistol as a person may become proficient at golf or tennis. But there are wrongs for which the law provides no remedy, or an inadequate one. I see no reason why a duel should not be allowed under certain conditions,

say after a certificate obtained from an official appointed for the purpose, and with such weapons as would ensure each party having a reasonably equal chance. A man should, of course, be at liberty to refuse a challenge, but the fact of his having done so without reasonable excuse would tend in the eyes of most men to bring him into contempt.

It is often supposed that a man is legally justified in killing his wife or her paramour if he actually takes them in the act. This is not and never has been the law, but if he is an actual witness of the adultery and kills under the immediate provocation, the killing is manslaughter, not murder. Extreme provocation, such as when a father sees his daughter violently, though not dangerously, assaulted, has been held to reduce killing from murder to manslaughter, and a confession of adultery by a wife, but not a mistress or fiancée, might be held to be such provocation as to effect a similar reduction. The killing must be in hot blood, immediately on the provocation, to be manslaughter only.

There are various forms of personal attack, such as unlawful wounding and causing grievous bodily harm. The maximum penalties range from penal servitude for life to imprisonment for two years, and the offences may be excused on the ground of the defence of person or property in a manner similar to justifiable homicide. To attempt to choke, suffocate or strangle or to use means calculated to produce that effect in order to render any person unconscious or incapable of resistance, with the intention of committing any indictable offence, is an offence punishable with penal servitude for life as a maximum and with flogging. The Garrotters Act of 1863 introduced the flogging, and it is worth while once more to mention the fact that flogging did not put down garrotting. Actually garrotting had ceased when Parliament, in a panic, because one of its own members had been garrotted,

passed the Act authorising flogging, and in the six years following the passing of the Act there was a slight increase of robberies with violence. Whatever may have been the cause, it is a fact that following Mr. Justice Day's sentences of flogging in Liverpool the number of cases of robbery with violence increased. For detailed evidence on these points see *The Lawbreaker* by E. Roy Calvert and Theodora Calvert, pages 238–58. Unbiased opinion and the evidence of statistics is strongly against the theory that flogging reduces crime.

Common assault is a crime usually punished so lightly that few people know that the maximum penalty is one year's imprisonment. This is where the person committing the assault is prosecuted upon indictment, a thing which very seldom occurs. As a rule assaults are dealt with summarily, when the maximum punishment is two months' hard labour or a fine of £5. In the case of an aggravated assault upon a woman or child the penalty may be six months' hard labour or a fine of £50. Costs may also be ordered to be paid. Strictly speaking, an assault is an offer or attempt of hostile violence, and if force be actually applied to the person of the other party the assault becomes a battery.

It is regrettable that assaults are so lightly regarded in comparison with offences involving property. The assaults that come before the courts form a small proportion of the number of cases. It is quite the exception for a person who is assaulted to prosecute. The fear of assault is a very real addition to the miseries of the poor. They are well aware that most magistrates regard assaults as mere "neighbours' quarrels", trifling matters upon which it is beneath their dignity to adjudicate. If a cross-summons is taken out, and often when it is not, binding both parties over is a common practice. A local bully will terrorise a court or a whole street, and even when he is unable to do

this, the accident of physical superiority will often enable a man to make the life of his neighbour, and his neighbour's wife, a misery to them. Comfortable people who are accustomed to the protection of the law cannot realise the humiliation of having to put up with insults of every kind, not only to a man but to his womenkind, because to resent them would only mean a thrashing and further humiliation. The average magistrate knows nothing at all about fighting or personal violence, though he would probably consider six months' imprisonment a light penalty for anyone who boxed his ears, and he does not realise that differences of age, strength or skill may make one man entirely incapable of resisting another. Except in the case of a fair fight agreed to by both parties no man, or woman, should be blamed or punished for using a weapon in resisting an assault. In theory they are usually justified by the law, but in practice one usually hears a lecture to the man who " did not use his fists " followed by a fine heavier than that inflicted on the original aggressor.

As showing how magistrates regard offences against property as compared with those against the person the Criminal Statistics show that in 1930 there were 16,484 persons convicted summarily of " simple larceny and minor larcenies ". The more serious larcenies, such as larcenies from the person, were not included in the 16,484. Of these 6294 were sentenced to imprisonment without the option of a fine.

There were 7379 convictions for common assault, and 746 sentences of imprisonment without the option of a fine. Thus 38 per cent. of persons convicted for larceny went to prison, but only 10 per cent. of those guilty of assault (see *Criminal Statistics for* 1930, published March 1932, pp. 64 and 65). The following are two typical instances which occurred the day before this was written. On 16th December, 1933, a man was convicted at Hertford of assaulting a referee at

a football match. He was stated to have used a filthy expression to the referee, and struck him twice as he was taking down the man's name. The referee was taken to hospital, where he remained unconscious for five hours, and was detained for thirteen days. The man who committed the assault was fined £3 and ordered to pay £7 5s. costs, the Chairman telling him he was lucky not to be sent to prison (see *Sunday Referee* for 17th December, 1933). On the same day the Brighton magistrates sent a woman to prison for twenty-one days for stealing eleven-pennyworth of chocolate. The woman collapsed in the dock and her husband fainted (see *Sunday Express* for 17th December, 1933). In another case of which I have personal knowledge a man, twenty-one years of age, committed an assault with a knuckle-duster. When he was arrested later in the day he committed a further assault. The assault took place on a golf-course, and the Chief Constable told the magistrates that the police had had previous complaints of the man having threatened people there. There was no suggestion of weakness of mind, so far as the accused was concerned, and he had been twice previously put on probation. The magistrates put him on probation again for twelve months (see *Birmingham Mail* for 29th November, 1933).

A person assaulted is entitled to strike back in self-defence, but not in revenge for the blow. It is not an uncommon trick to provoke the other man into striking first as an excuse for giving him a thrashing. The excuse is not good in law.

A great deal of cant is talked about corporal punishment in schools. The law as to the parental right of reasonable chastisement and its implied delegation to the schoolmaster is well known. But many people are tired of hearing about the excellent results of corporal punishment as exemplified by its advocates, who recount their own experiences with simple pride.

Apart from the fact that there is by no means the unanimity as to their own qualities which they take for granted there is a serious difference between the position of rich and poor parents. The rich can send their children to whatever school they choose. If they dislike corporal punishment, or the way it is used in a school, they can patronise another more to their liking. The poor have no such choice. However terrified a child may be at its school, its parents are bound to send it there or be punished. I make no suggestion of brutality against elementary school teachers as a class, but there are exceptions who are callous or have sadistic tendencies. Often it is impossible to control the immense classes that are commonly found without using bodily fear as an instrument. To comply with the law corporal punishment of a child must be reasonable and moderate. The kind of thing which might apparently be done with deliberation in the days of our fathers and grandfathers is shown in the case of R. *v.* Hopley, decided in 1860 (see *English and Empire Digest*, Vol. 15, p. 792), where a schoolmaster beat a boy for two and a half hours with a thick stick. The master had taken the precaution to write to the boy's father asking permission to beat him severely to subdue his obstinacy. It must have been an unpleasant surprise to this gentleman when, the boy having inconsiderately died, he was put on his trial for manslaughter.

A husband, contrary to the belief entertained in certain districts, has no right to inflict corporal punishment on his wife under any circumstances. I remember a year or two ago a woman coming to consult me about some trouble with a neighbour. She had a black eye and when I asked her how she had got it she told me her husband had given it to her because he had found her speaking to another man, who happened to be her uncle, in the street. She did not seem to think she had any special ground for com-

plaint, but incidentally mentioned that her uncle had struck her husband in reply. Later in the day the husband turned up, with one of the finest black eyes I have ever had the pleasure of seeing, and seemed quite genuinely surprised when I told him he had got what he deserved, and would have little chance of success if he took out a summons against the man who had struck him. His insistence on the fact that the woman was his wife was almost pathetic.

A master had formerly the right reasonably to chastise a servant. It is probable that the right has become obsolete, but Halsbury's *Laws of England* (2nd edition, Vol. 9, p. 473 n.) suggests that this is doubtful. In view of the recent revival of other ancient legal remedies it is perhaps as well that the working classes do not study Halsbury. Otherwise they might be anxious, not altogether without reason. It should be remembered that the jurisdiction of the magistrates in a case of assault is ousted by a bona fide claim of right, as where the assault complained of arises in connection with a disputed right of way. This point does not prevent an action being brought in a civil court.

A woman has a right to kill a man who attempts to ravish her. In magazine stories this often affords an adventuress an opportunity of getting rid of inconvenient men, but in real life the easier method used by Potiphar's wife is usually preferred. Rape is a rare but very serious offence, and one which is difficult to prove. Although rare, it is probably commoner than statistics indicate, owing to the difficulty of proof and the extreme reluctance of the persons assaulted to come forward. There is an amazing case in the Law Reports which occurred in 1877 where a man had sexual connection with a girl of nineteen, obtaining her consent by the pretence that he was treating her medically and performing a surgical operation, which she believed. The man was found guilty of rape (see R. *v.* Flattery,

English and Empire Digest, Vol. 15, p. 844). There were somewhat similar cases in 1898 and 1923. In the latest case consent was obtained by the pretext that voice capacity was being tested. I have myself known of, though I was not professionally concerned in, a case of indecent assault where the facts were that a girl employed at an inn was induced to strip for medical examination by a man who pretended to be a doctor. She had complained of some trifling ailment, which the man suggested he could possibly cure if given an opportunity of diagnosis. The girl's suspicions were aroused by hearing the supposed doctor laughing immediately he had left the room. A similar case was reported in 1824 on the legal point as to consent (see R. *v.* Rosinski, *English and Empire Digest*, Vol. 15, p. 826).

CHAPTER IV

SEXUAL IRREGULARITIES

THERE are a number of matters which call for consideration under this head. I propose to deal with them separately. It is usually some comfort to distressed relatives to know that there is scarcely a family which has not a skeleton in the cupboard of one kind or another. This is not necessarily a bad trait in the persons finding consolation. It is merely the recognition of the common humanity of the so-called sinner.

In the following pages I do not propose, except incidentally, to touch upon the questions dealt with so adequately by Mr. Havelock Ellis and Mr. Bertrand Russell, and in the vast literature of modern psychology. I am merely concerned with the English law upon these matters and the way in which it concerns the ordinary citizen.

Affiliation

The question of the fatherhood of an illegitimate child provides one of the commonest and also one of the most difficult problems which come before the courts.

In outline the course of an application by a woman to obtain an affiliation order against the man whom she alleges to be the father of her child is simple enough. Any single woman who may be with child or may be delivered of a bastard child may either before or within twelve months after the birth take out a summons against the man she alleges to be the father

calling upon him to appear before the magistrates at the " Police Court ". On the hearing of the summons the court hears the evidence of the woman and her witnesses, if any, and that for the defence, and if the magistrates are satisfied by the woman's evidence, which must be corroborated in some material particular, that the defendant is the father of the child, they may make an order for him to pay not more than 20s. weekly for the maintenance and education of the child, and also the costs of obtaining the order and certain expenses incidental to the birth. This order may be in force until the child attains the age of sixteen.

The expression " single woman " raises the first difficulty. That a widow and a divorced woman should be included under this description is natural, but by judicial decisions it has been extended to include, under certain circumstances, married women living apart from their husbands. The judges appear to have arrived at this conclusion on the principle, familiar to all who have been concerned with affiliation proceedings, that " somebody's got to keep the child ". For it has been held that a woman who marries after the birth of the child and before making an application cannot get an order. The ground for excluding has been said to be that as her husband has become liable to support the child the law cannot have intended that there should be a double liability.

The layman may be excused for considering the law, as judicially interpreted, absurd. A married woman who is judicially separated, or who has obtained a separation order from the magistrates, and is living apart from her husband, is held to be a single woman under the Act, and can apply for an order, it being considered that she and her husband will reverently obey the non-cohabitation clause (see Boyce *v.* Cox (1922), 1 K.B. 149). But in another case a woman married a seaman in the Royal Navy. Between December 1914 and August 1916 the husband was

serving on his ship, and could not possibly have had access to his wife. In March 1916, fifteen months after the last occasion on which she could possibly have met her husband, the wife had a child. The High Court held that the woman was not living separate and apart from her husband during his absence at sea, and was not a " single woman " (see Marshall *v.* Malcolm (1917), 87 L.J.K.B. 491).

The question of applications by married women is complicated by the principle, finally established by the House of Lords decision in Russell *v.* Russell, that every child born in wedlock is presumed to be legitimate, and that neither husband nor wife will be permitted to give evidence tending to bastardise it. Consequently non-access has to be proved by evidence other than that of the husband or wife before an application by a woman who is only technically " single " can be proceeded with. Such proof is usually difficult, and sometimes impossible. If, however, there is a judicial separation or a separation order there is a presumption of non-access. Apparently a deed of separation will also raise a presumption of non-access, but this has been doubted.

The next point is the question of the application for the summons being made within twelve months after the birth of the child. If the alleged father has paid money for the child's maintenance within twelve months of the birth a summons may be taken out after the twelve months have expired. Incidentally, the limitation as to time does not prevent an application by the Guardians of the Poor (now the Public Assistance Committee) at any time before the child is thirteen years old, should it become chargeable to the parish.

The point which most frequently arises is that with regard to the necessity for corroboration of the applicant's evidence. Corroboration has never been judicially defined.

In Burbury *v.* Jackson (1917) 1 K.B. 16, Lord Reading said:

"Corroboration involves something more than possibility; it involves evidence which tends to show probability."

So that the reader may have the advantage of seeing how the High Court regards the question of corroboration, I will give the short facts of three decided cases, in each case from the headnotes of the reports.

The first case is Hill *v.* Denmark (1895), 59 J.P. 345.

"On the hearing of a summons for an order of affiliation the mother, a servant girl, gave evidence that she 'walked out' with defendant on February 22nd and 25th, 1894, and never afterwards, and found herself in the family way in March. Evidence was given by witness that, in the September following defendant, a boy of nineteen, went with his mother to the house of complainant's stepmother 'to clear it up', but when the stepmother asked if he was the father, he did not answer, and the complainant's step-sister, being then present, also asked him 'if he had been out with her sister', and he said yes, he had. The child was born on November 20th."

The second case is Harvey *v.* Anning (1902), 87 L.T. 687.

"On the hearing of an application for an affiliation order, in corroboration of the evidence of the mother, who was a servant of the defendant's grandfather, evidence was given that defendant and complainant were seen 'out together evenings in the lanes', and that after the birth of the child defendant asked a witness whether complainant, whom he spoke of familiarly as 'Till', was going 'to swear the child'."

The third case is Thomas *v.* Jones (1921), 1 K.B. 22.

"Defendant was charged on complaint preferred by complainant with being the father of a bastard child of complainant. Defendant was a farmer and a bachelor. Complainant was his housekeeper. On the

morning of the birth when complainant was in labour, defendant, who had no other female servant, lit a fire for her and took her some tea and brandy. He also sent for the doctor. After the birth he allowed her and the child to remain for five weeks and two days, until June 17th, in his house. There was no evidence whether she was sufficiently recovered to have left at an earlier date. Defendant admitted that during those five weeks and two days he never asked complainant who was the father of her child. Complainant in her evidence said that during that time, though she did not fix the date except that it was before June 16th, she asked defendant what he was going to do about the child, and he said that there was nothing for him to do but to pay. After complainant had left his house she wrote him a letter charging him with being the father of the child, and asking him if he meant to pay for its maintenance. To that letter he made no reply."

Let the reader carefully read the facts of each case, and then consider whether he would hold the woman's story to be corroborated in some material particular, or not. In actual fact, the High Court held that there was corroboration in the first two cases, but not in the third. I do not for one moment venture to criticise the correctness of any of these decisions. There were divided opinions in the High Court in two of the cases cited, for in Harvey *v.* Anning Lord Alverstone, then Chief Justice, and Mr. Justice Channell held that there was corroboration, but Mr. Justice Wills dissented, while in Thomas *v.* Jones Lords Justices Bankes and Atkin held there was no corroboration, but Lord Justice Scrutton dissented and thought that the fact that the alleged father allowed the woman and her child to remain in his house for thirty-seven days was some corroboration under the circumstances.

An application for an affiliation order is dealt with, as we have seen, by the magistrates at the " Police "

Court. There is an appeal to Quarter Sessions, or to the High Court by way of Case Stated on a point of law, but both methods of appeal are costly. Magistrates, even stipendiaries, usually lean strongly in favour of the applicant. Partly this is due to the feeling that "somebody has got to pay for the child", the aforesaid somebody being the ratepayers, if an order is not made, it being obviously impossible for the woman to accuse any other man. Partly it is due to natural feeling in favour of the woman, who, they suppose, must know best who the father is. There is a strong dislike on the part of most magistrates for the necessity of corroboration, which prevents them from doing as they please.

Notwithstanding the objections taken to the rule as to corroboration by so weighty an authority as Mr. Lieck, the Chief Clerk of Bow Street Police Court, in the provinces it would be very dangerous to abolish it. I am doubtful if it would be safe even before London Police Magistrates, for in matters involving sexual relations men are apt to hold strange views. I have myself heard an eminent legal authority express the opinion that if a man had had sexual intercourse with a woman, even at a time when he could not have been the father of her child, he deserved to have an order made against him. It is surprising to find how widespread views of this kind appear to be.

In actual practice, however, the rule as to corroboration is not so useful as a check on false claims as it should be. It helps the defence by giving additional opportunities for cross-examination, but it seldom prevents any but an innocent girl, whose friends are as inexperienced as herself, from getting a case on its feet, whatever the ultimate result may be. The necessity for corroboration, however, prevents magistrates from making orders with the facility they would otherwise exercise, and compels the bench and their clerk to pay some attention at least to the actual evidence,

instead of merely accepting the complainant's story as true.

The usual course adopted by complainants to get over any difficulty there may be as to corroboration is to set out with a convenient relative or friend and endeavour to catch the defendant by himself. He is then quite helpless, if the women are unscrupulous. Even if he has relations or friends of his own with him, he is in a difficult position. Silence, which is usually considered safe, will almost certainly be held by the average bench to prove guilt. Hasty contradiction of everything said by the other side, an exceedingly likely thing with an angry and uneducated youth, may be corroboration under some circumstances if the contradiction be proved untrue. Time after time it has happened that I have been consulted by men and youths who were aware that accusations, according to them unfounded, had been made against them. I have warned them of the vital necessity of having nothing whatever to say to the other side. When the case has come into court there has been detailed evidence of admissions alleged to have been made by the defendant to the complainant and her witnesses *after* the date on which he had been warned. I have also more than once definitely advised that a case was hopeless for lack of corroboration, and have subsequently known an order obtained on corroborative evidence which must have been concocted. Magistrates' clerks are often placed in a difficult position in a similar way. A woman or girl is refused the issue of a summons for want of corroboration the necessity of which is explained to her. A few weeks, or sometimes days, later, applicant comes again, having obtained the necessary evidence, always in the same way.

In a large number of cases the girl finds herself pregnant, and then decides what man she will select to father the child. Frequently offers herself to some

youth who can afford to pay. I have known two cases, and suspected more, where the real father has introduced to the girl the man whom she subsequently accused and obtained an order against. In another case I appeared for a girl barely sixteen years of age. The summons had been taken out before I was instructed, and I advised that the corroboration was insufficient, and the case had better be adjourned so that further evidence could be obtained. Against my advice the girl and her father insisted on the application proceeding, and it was in due course dismissed. The girl and her relatives took the result very cheerfully, and took no interest in what I told them with regard to the possibility of bringing fresh evidence. Some months afterwards I learned that a married man was suspected of being the father of the child and that in order to avoid possible criminal proceedings he had "compensated" the girl and her father and had suggested and financed the proceedings against the youth. Obviously the girl could not be a witness against another man afterwards.

There is no class of case more unpleasant to handle than affiliation proceedings, and most decent solicitors dislike them intensely. The only redeeming feature about them is that occasionally one has the satisfaction of showing up and obtaining an order against a blackguard. Some advocates who deal with such cases are quite unscrupulous not only in the way they "trim" evidence, but in the brutality of their cross-examination of the applicant. I have heard a common-law clerk say that he could coach a woman in an hour to get an order against any man who could be proved to have been alone with her for half that time anywhere during the requisite period. As to unfair cross-examination I am well aware of the common form advice to women in the witness-box—"when in doubt, cry". I have seen that trick played many a time. It is one of the most difficult things in the world

for an advocate who has not the hide of a rhinoceros to do his duty for the defence. But there are some advocates with a nasty kink in their nature, who seem to enjoy putting the most intimate questions to a girl or woman as coarsely as they can, especially when they think they have a case which will be lost in any event. I have often known girls who were reluctant to bring forward perfectly good cases because of what they had been told by others of the terrible ordeal of the witness-box. Deaf magistrates, who abound in our courts and are usually chairmen by reason of seniority, are a great handicap to a modest girl. Only a week before this was written I was concerned for the defence in an application for an affiliation order before a chairman eighty-three years of age and nearly stone-deaf. The unfortunate girl had to shout her answers in open court, and frequently to repeat them. As a result she nearly fainted, and the hearing had to be stopped while she was given water and a seat. I have often seen similar things happen, and several times the witness has actually fainted.

On the other hand may be quoted another case which was heard a month ago. The applicant had given in evidence that intercourse had taken place, each time without resistance or complaint on her part. On my asking her in cross-examination a detail as to the *locus in quo*, she replied that she did not think I ought to ask such a question of a young unmarried girl. The same girl also swore that neither her mother, who had seven other children, she herself, nor the doctor who attended her regularly for three months prior to the birth knew she was pregnant until the baby was actually born and that neither the mother nor the doctor had asked her anything as to her relations with men.

With absolute unanimity every solicitor of my acquaintance with experience in this class of case is strongly opposed to the marriage of the parents of

a child when this is suggested as a way of settling the matter. Such forced marriages almost always turn out badly. Yet one constantly hears aged magistrates suggesting the adjournment of applications for affiliation so that the parties can get married. The Act of 1926, legitimising the pre-marital children of parents who subsequently marry, has done an immense amount of good in diminishing the necessity for and thus reducing the number of hasty marriages.

The vile treatment of unmarried mothers is not so prevalent now as it used to be. This is one of the few good legacies the war has left us, for the increase in tolerance dates from then. It used to be a common practice to turn out a girl who was found to be pregnant, however near her time might be, and although her employers or her parents knew she had nowhere to go.

Employers in these days are usually more humane, and the difference in the modern point of view is fairly illustrated by the following true story. Clients of mine had a parlourmaid, a particularly nice girl, happy in her job and a favourite with her employers. She had been with them several years when she confided in her mistress that she was pregnant. The girl's "young man"—"boy friend" is, I believe, the current description—was sent for and interviewed by the mistress of the house, who sternly told him the position. To her surprise the man's face lit up with happiness.

"Oh, I am so glad," he exclaimed; "now perhaps Clara will marry me at last."

I was, however, assured only a year or two ago that a certain large hospital dealing with maternity cases admits no unmarried mothers, owing to a well-known philanthropic woman making this a condition of the continuance of a very large annual subscription.

Readers who wish to appreciate the immense change that has come over public opinion should read about

" little Emily " in *David Copperfield* and in particular her letter in Chapter XI of Vol. 2. The story of Hetty Sorrell in *Adam Bede* relates to much the same period. More recent illustrations may be found in George Moore's *Esther Waters*, which were banned from the bookstalls, and Hardy's *Tess*, which aroused a storm of criticism, mainly adverse, when it was published.

Tess, by the way, provides an almost incredible example of Victorian prudery. In Chapter XXIII of *Tess* Angel Clare meets the four milkmaids who have been cut off on their way to church by the sudden rising of a brook. He carries them across the flood in his arms, one by one. This harmless episode was too much for the Editor of the *Graphic*, in which *Tess* originally appeared in serial numbers, and he solved the awful problem by making Clare wheel them over in a barrow, leaving the dialogue unchanged. As old *Graphics* may not be readily available, two short extracts follow, the first from the current version of *Tess* and the second from the *Graphic* of August 29th, 1891.

" ' I'll carry you through the pool—every Jill of you ! '

The whole four flushed as if one heart beat through them.

' I think you can't, Sir,' said Marian.

' It is the only way for you to get past. Stand still. Nonsense ! you are not too heavy ! I'd carry you all four together. Now, Marian, attend,' he continued, ' and put your arms round my shoulders, so. Now ! Hold on. That's well done.' "

The following is the *Graphic* version.

" ' I'll wheel you through the pool,—all of you—with pleasure, if you'll wait till I get a barrow ! '

The whole four flushed as if one heart beat through them.

' I think you can't, Sir,' said Marian.

'It is the only way for you to get past, and there's a barrow in that shed yonder!'

In a minute or two he had fetched the wheelbarrow and rolled it till it stood beneath them.

'Now, Marian, attend,' he continued, 'and sit upon the top, and put your arms round my shoulders, so; or you'll fall off. Now! Hold on. That's well done!'"

It is rather difficult to visualise Marian's actual attitude sitting in the barrow with her arms round Clare's shoulders, unless she was an acrobat and a contortionist, for, in both versions,

" his slim figure, as viewed from behind, looked like the mere stem to the great nosegay suggested by hers."

The law is confused as to the amount of the order to be made in affiliation proceedings. Theoretically, the welfare of the child should be the guiding consideration. But the justices may also take into consideration the conduct of the mother, as for instance whether she was the seducer or the seduced and whether there was any promise of marriage made to her, matters which it is hard to see how the child could have influenced in any way.

Failure to pay instalments under an affiliation order may be punished by imprisonment not exceeding three months. The magistrates can commit without any evidence as to means. This was decided by the case of R. *v.* Richardson (1909), 2 K.B. 851, in the course of which, however, Mr. Justice Darling observed that if the man could satisfy the justices that he had no means they were not obliged to send him to prison. Actually they sent 2540 men to gaol for non-payment of bastardy arrears in 1930, the last year for which statistics are, at the time of writing, available (see *Report of the Commissioners of Prisons*, issued August 1932, page 99). A large proportion of these men probably could not pay. Orders are often made by magistrates quite irrespective of the man's means. I

have known 10s. a week ordered against an unemployed man. The weekly amount allowed for a child as unemployment benefit, or as out-relief, is 2s. a week. Frequently, too, the magistrates are wrong in their decision, and the man, unable through poverty to appeal, labours under a sense of grievance and goes to prison rather than pay. In 1929 there were 159 men who had been previously committed five times or more, seven of them more than twenty times, for non-payment of bastardy arrears.

In February 1934 I was in a certain court when a man was brought up in respect of £79 arrears. The original order was for 10s. a week, made twelve years previously, and the arrears had accumulated over several years. The man said he had been unemployed during a great part of the time.

The Chairman said, " Why didn't you apply to us to have the order reduced, as you might have done ? "

The man answered, " I did apply, and I was told I couldn't come to the court till I'd paid off the arrears."

The Chairman subsided. This is the most recent of many similar instances within my personal knowledge.

The refusal to allow an application for variation to be heard until arrears are paid off is customary in many courts, and obviously works grave injustice. It is based on a statement of the law contained in Stone's *Justices Manual*, which is doubtfully supported by the case therein cited.

The Blood Group test, by the analysis of the blood of the child and its alleged father, is widely used in Germany and Austria. It has, however, only negative value. It may prove that the man cannot be the father of the child, but cannot do more in the other direction than show that it is possible for him to be the father. The trouble about its use is that the average bench of magistrates would almost certainly take paternity as proved in cases where a negative result was not shown.

It is important, in settling any claim in respect of the fatherhood of a child, to take professional advice. An agreement to settle for a lump sum or otherwise does not prevent the mother from taking proceedings, although the agreement may be taken into consideration in fixing the amount of the weekly payments if an order is made. Usually some person joins in the agreement to indemnify the father against future claims. From the mother's point of view an agreement between the parties gives much less security than an order of the court. On default it can only be enforced by the slow and comparatively expensive process of judgment summonses in the County Court in which the debtor's means have to be proved to the satisfaction of the Judge. Under a bastardy order the collecting officer of the court, at the instance of the mother, institutes proceedings for recovery of arrears.

The marriage of its parents, as from 1st January, 1927, or the date of the marriage, whichever last happens, renders a bastard child legitimate, unless either parent was married to a third person when the child was born. The exception, which bastardises a number of children, is due to ecclesiastical influence.

Exhibitionism

Rape and serious sexual assaults are rare. They are usually simple though horrible crimes, and obvious enough both in their nature and motive. The commonest, and in some ways the most distressing, sexual offence is indecent exposure. In 1930 there were 1486 cases in which this offence was proved, and 605 offenders were committed to prison. Probably this does not represent a tithe, perhaps not a hundredth part, of the offences committed. It is comparatively seldom that such cases are reported to the police, when reported detection is difficult, and even when detected

complainants and witnesses are very reluctant to come forward.

In the majority of these cases the offender is impotent, and suffers from a mental kink. I have known of a man who was convicted of this offence over fifty times. Apart from the shock and possible nervous trouble which may be caused to young girls and children, no great harm is done, though it is, of course, unpleasant to older women to be exposed to insult in this way. There are some instances, however, in which one can feel little sympathy for the complainants. I remember defending in a case where the accused, who had been a P.T. instructor in the army, was charged with indecent exposure. The complainant, a middle-aged woman, thought she saw the man at the window of a house well back from the side of the road opposite to that on which she was passing. She walked on for a hundred yards or so, and then went back to have another look which confirmed her suspicions. No one could have seen the man unless they had deliberately looked for him. The defence was that the accused was doing exercises naked, and had not realised that he was near the window. He was acquitted, after a lengthy hearing. All the stories of the "Ah, but just you climb the steps and take a look through these opera-glasses" type can be matched in actual practice.

It is important to distinguish these cases from those of indecent assault, with which they have no connection whatever. The trouble about them is that such incidents suddenly occur without a man's relatives or friends having the slightest warning. As a rule they are at first utterly incredulous and afterwards filled with loathing for the offender. They should feel pity, for the wretched man cannot help himself, and is a fit subject for medical rather than penal treatment. The difficulty for the ordinary man, confronted by suspicion of such a case in his own family, is that he

is as a rule ashamed to consult his family doctor, and the only information available is from technical works, impossible for the average layman to understand, or from other ordinary men whose talk is of the cat and castration.

One of the most appalling features of these cases is that the accused has no right to a trial by jury, but has to be dealt with by the magistrates at the " Police Court ". Before many benches, probably the majority, the presumption of innocence, which should be the foundation of our system of criminal justice, is ignored, and the accused has to prove his innocence. This is an exceedingly difficult thing to do in cases of this kind. An alibi is always difficult to prove, and the question in most cases is as to whether the complainant and her witnesses are mistaken as to what they saw. The prosecution has the sympathy of the court, who are always anxious to " put a stop to this sort of thing ". The maximum punishment is three months' imprisonment or a fine of £25, but the stigma caused by conviction is usually far more serious than any penalty imposed by the court. An appeal to Quarter Sessions is possible, but expensive, and Quarter Sessions is usually not much better than the court of first instance. Let any innocent man consider what he would do if he were to be accused of such a crime, probably by some indignant mother, on his identification by some small child as the person who had misbehaved himself on some previous occasion. Probably his every action and speech would be such as apparently to indicate conscious guilt. Children are often given to inventing the most atrocious stories, and the children of the back streets usually have a precocious knowledge of sexual matters. After a considerable experience of cases of this kind, I have little doubt that there are a number of wrongful convictions for this class of offence among those who are only convicted once. Where there is a mental kink

the impulse appears to be almost irresistible, and without a mental kink the offence is rarely committed. It may be significant that of thirteen appeals from conviction for indecent exposure in 1930 eight were successful in getting the conviction quashed, in three the sentence was modified, and in two only was the conviction upheld without modification.

Perversions

It is impossible, in any book written for the general public, to deal freely with these matters. It is unfortunate that this should be so, for there is a great deal of popular misunderstanding on the subject, with the result that most people suppose things to be worse than they are. The more decent way is to speak plainly, but this is not permissible. Comparatively few people outside the legal and the medical professions know what sodomy and bestiality really are. They are not in fact at all common, except in certain localities, and they are not dangerous to the community, for they have no attraction whatever for the normal human being. What is important is to explain what they are not, for there is much confusion in the public mind on these points, largely generated by certain nasty-minded writers in popular papers. What follows is not written for the scientific or medical reader, but for the ordinary layman. It may in details be technically inaccurate.

There are certain characteristics which are said to be male, and others female. There are others which are common to both sexes. This is so in both the physical and mental make-up. So long as male characteristics predominate in a man, and female in a woman, there is normality. But when a man is so unfortunate as to have a woman's mind and general emotional outlook, or vice versa, we have what is called inversion. Such persons are called inverts

They are not as a rule perverts of any kind. The word introvert, by the way, has nothing to do with inversion, and belongs to another jargon. It is a common and cruel mistake to suppose that inverts are given to unnatural vice of any kind, though natural sex life, and even mixing in ordinary society, is not easy for them. The particular display of inversion which takes the form of dressing in the clothes of the opposite sex is called Eonism, after the Chevalier d'Eon, an eighteenth-century Frenchman whose sex was doubted throughout his life. He was at one time a fencing master, and fought more than one duel. There has been a well-known recent instance of a woman who preferred to live as a man, and for a considerable time passed as one. The invert, if a man, runs some danger of being suspected of serious crime, owing to the popular ignorance before referred to. Unnatural sexual vice between women is not in itself criminal. It is known as Lesbianism. There has been a recent dictum by Mr. Justice Avory that in some circumstances it may be criminal. Inversion is also called homosexuality. To be homosexual does not, as commonly supposed, imply addiction to homosexual vice. A theory that greatness in art, literature and music is commonly accompanied by homosexuality has been widely held. It is likely enough to be true, but it in no way implies that these great men were vicious. The contrary is more likely, for it was probably the absence of sexual distraction, or the direction of sexual desires into other channels, sublimation, if jargon is preferred, that led to their greatness in art. Abnormal sexual satisfaction would have had the same effect as normal in making artistic expression of the emotions unnecessary to them.

One other point may be noted. The current belief that persons who commit serious offences of a perverted nature are always of poor physique and degenerate appearance is erroneous. They are usually excep-

tional, as might be expected, but they are frequently above, not below, the average. Oscar Wilde, for instance, is said by Sir Frank Benson to have been of great muscular strength. Apparently he was the strongest man of his time at Cambridge.

Abortion

This is a matter which urgently needs public attention. The subject has been persistently hushed up, with horrible results. As the law stands, any person procuring abortion, that is, unlawfully administering poison " or other noxious thing " with intent to bring about a miscarriage, or unlawfully using " any instrument or other means whatsoever " with the like intent, may on conviction be sentenced to penal servitude for life. Knowingly procuring drugs or instruments for such a purpose is an offence liable to be punished by penal servitude for three years' or two years' imprisonment (see 24 and 25 Vict., c. 100, Offences against the Person Act 1861, Secs. 58 and 59). Under the Infant Life (Preservation) Act 1929 any person who intentionally causes the death of a child capable of being born alive, before it has an existence independent of its mother, is liable on conviction to penal servitude for life. Evidence of twenty-eight weeks' pregnancy is prima facie evidence that a child was capable of being born alive, but the onus is on the prosecution to prove that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

Procuring abortion is said to be justifiable only on the ground that the life of the mother would be endangered or her health permanently injured by the continuance of the pregnancy. Unless one or both of these conditions are satisfied the artificial termination of pregnancy is what is commonly called an " illegal operation ".

The subject is one which is difficult to discuss. The actual facts are known to a number of doctors and solicitors and to many social workers, but for obvious reasons it is not possible to say much. That the artificial termination of pregnancy, without more than a formal pretence of justification, is a frequent incident in medical practice, I believe to be true.

It is hard to get medical men to discuss this matter except in confidence. Further, as with the question of contraception, their professional views tend to be coloured by their private prejudices. That the operation itself is without serious risk, if performed in the early stages of pregnancy, appears to be true. It may also be true, as some medical men assert, that the interruption of pregnancy, apart altogether from the operation, may have harmful effects. As against this, it is not denied that the effect upon the nervous system of an undesired pregnancy may be still more serious, quite apart from the dangers of childbirth. The trouble with medical men is that on this question, as to a lesser degree with those of contraception and sterilisation, they are more anxious to be respectable than scientific.

Anyone who wishes to learn more may read Chapter IV of *The Cost of English Morals*, by Mrs. Janet Chance. Those who have any doubts as to the nature of the book may be reassured to hear that it has an introduction by Sir Thomas Horder, now Lord Horder. Mrs. Chance says, on page 52:

"Attempts at abortion are commonly made even among those who have knowledge of the best contraceptives, and it would probably be difficult to find a single uninstructed poor and fertile mother alive who has not made some crude and furtive attempt to get rid of an unborn child."

After thirty years of professional practice, during which I have mixed a great deal both with doctors and the poorer classes, I am compelled to express complete

agreement with this statement. I have also heard it confirmed by police-women. Attempts at abortion are common in cases of bastardy, but nothing like so common as with the wretched working-class mother after the second or third child. An illegitimate child is not such a tragedy as an unwanted infant born in wedlock. A court order for payment of from 5s. to 10s. a week by the father, or some other man, can usually be obtained, if he is unwilling to pay without one, but no such provision exists for the married woman. If her husband is unemployed, she will get an additional 2s. a week. If he is in work, nothing. The result is that many women, healthy enough before marriage, become utter wrecks in a few years, either from incessant child-bearing or unskilled abortions, or both. I have personally known a woman who had borne twenty-three children, not one of whom lived to be one year old. Fortunately the knowledge and use of contraceptives is increasing, but most employers have at one time or another been shocked to see the state to which a few years of married life has reduced a once pretty and healthy maid-servant or factory hand.

In 1930, the last year for which statistics are available, there were fifty-six convictions for procuring abortion. The yearly average for the years from 1920 to 1930 is fifty convictions. On the figures of convictions abortion would appear to be even rarer than murder. And yet it is in fact one of the commonest offences.

The question as to whether procuring, or attempting to procure, abortion is or is not a crime depends in effect upon the state of medical opinion. It is reasonably safe for any respectable doctor to practice abortion. If he acts in conjunction with another medical practitioner he is absolutely safe, for no jury would convict where there was a conflict of medical testimony as to whether or not the operation was necessary.

Yet, as the law stands, it would be unlawful to procure abortion in the case of a child of fifteen who became pregnant through being raped by a lunatic. This is quite a possible contingency, and may have happened. In 1930 there were three cases of rape by criminal lunatics, but the age of their victims is not stated.

That a high rate of maternal mortality and the birth of numbers of weakly and defective children are the direct result of the present state of the law is obvious. The remedy is to teach birth control and legalise abortion when performed by a qualified medical practitioner. In considering this problem, as with all sexual matters, it is necessary to sterilise the mind and get rid of the prejudices which we have most of us unconsciously absorbed. To the ordinary man or woman the word abortion implies at first sight something almost unthinkable. Yet if they will only face the ugly facts without shrinking it is probable that they will realise the need for alteration of the law. It is not that procuring abortion is a good thing, even when skilfully performed. But it will certainly be done, and the only sane thing is to diminish the demand for it, and so far as possible to ensure that it is performed under conditions of safety and decency.

Prostitution

Anyone who wishes for information about the history of prostitution may refer to Lecky's *History of European Morals*, where the subject is treated at great length. Sexual intercourse outside marriage is not in itself an offence against the law, although in the time of the Puritans it was punishable by three months' imprisonment. One of the most remarkable things about Anglo-Saxon morals is the difference between the public and private view as to male chastity. The ordinary public assumption is that the average man is

chaste until marriage, and faithful afterwards. In private among young men abstention from sexual intercourse is usually regarded as ridiculous, although sexual experience is taken as so much a matter of course that the virtuous exceptions are seldom detected, and are probably more numerous than is supposed. But the important point is that there is not the slightest doubt as to which practice predominates, and is considered the normal and proper one. I do not suppose it is as rare as the late Frank Harris thought it for a man to live continently until attaining the age of twenty-nine. Harris says on page 118 of his *Bernard Shaw:*

"I found this incredible and inconceivable on any assumption that Shaw is a normal man."

In a recent volume of short stories by an American writer (*Company K*, by William March) one of the characters says:

"I have thought the matter over a thousand times, but I cannot understand even yet what there is about male chastity that is humorous or why it offends and repels."

Even in Victorian times there cannot be the slightest doubt as to what was usual. Even writers like Charles Kingsley admit it, and Meredith speaks openly enough in *Richard Feverel.* Yet there is, so far as I remember, no Victorian novelist of any note who permits any of his heroes to have illicit relations with a woman without exhibiting the sternest disapproval. Thackeray openly expressed his regret that it was impossible to depict men as they were.

Modern novelists nearly all agree in taking the unchastity of both men and women as a matter of course. But in the newspapers and ordinary middle-class conversation no such admissions are made. An interesting inquiry was instituted by an American doctor among a number of upper-middle-class men and women. In the result he found that the great majority

of men and a majority of women admitted having had sexual relations before marriage, though with only a minority of women had these taken place with persons other than their future partners. The state of things here is probably much the same. But it is not admitted.

The term prostitute denotes a woman who sells her body otherwise than in marriage. This may be for acts of indecency and not normal sexual intercourse. Prostitution is not in itself an offence. It may, however, under certain circumstances become one. Under the Vagrancy Act 1824, Sec. 3, every common prostitute wandering in the public streets or public highway, or in any place of public resort, and behaving in a riotous or indecent manner, commits an offence punishable by a month's imprisonment or a fine of £5. This offence can be tried by one unpaid magistrate, but he cannot impose a greater penalty than 20s. This section is now seldom used in practice, as a good deal has to be proved. The cases show that the Courts of Summary Jurisdiction are easy to satisfy as to what is "riotous and indecent" behaviour, but Quarter Sessions are less so. It is clear that merely accosting men is not an offence under this section (R. *v.* Duke, 73 J.P. 88). Under the Town Police Clauses Act 1847 any common prostitute or night-walker loitering and importuning passengers for the purpose of prostitution in any street in any urban district to the obstruction or annoyance of the residents or passengers may be arrested and on conviction punished by a fine of 40s. or fourteen days' imprisonment. This offence also can be tried by one unpaid magistrate but he cannot inflict more than a 20s. fine. Under the Public Health Act 1907 these offences are also punishable when committed in places of public resort under the control of the local authority or in any unfenced ground adjoining any street.

Soliciting to the annoyance of inhabitants or passen-

gers is also an offence under the Metropolitan Police Act 1839, Sec. 54, and there are also local acts and bye-laws containing similar provisions. In these cases it has been held that annoyance must be proved, but that it is not necessary to call the person annoyed as a witness.

In 1930, according to the Criminal Statistics for England and Wales issued by the Home Office, there were 1161 offences by prostitutes which came before the " Police Courts ". In all but 15 cases the alleged offender was actually apprehended, not summoned. In 61 cases the charge was withdrawn or dismissed, in 105 the charge was held to be proved but no conviction was registered and there were 995 convictions. In 174 cases the sentence was imprisonment without the option of a fine, but as there were 249 receptions into prison for this offence it is clear that the fines were not always paid. A striking feature of the criminal statistics relating to prostitution is the fall which took place following the Savidge Inquiry, and the Report of the Street Offences Committee. The figures show that the annual average of persons dealt with summarily for this offence for 1920 to 1924 was 4317. In 1925 it was 3222, in 1926, 3965, in 1927, 4340, in 1928, 2992, in 1929, 1133, and in 1930, 1161. The Savidge case occurred in April 1928, and the Report was issued in July of that year. The Report of the Street Offences Committee was issued in November 1928. The charge in the Savidge case, which was dismissed with costs against the Police and which led to the Inquiry, was one of offending against public decency, and not solicitation, but the result of the two reports was a tremendous diminution of the cases of solicitation brought before the courts.

The distribution of cases of prosecution for this offence is remarkable. I do not pretend to offer any explanation, except to point out that the statistics with regard to drunkenness, which admittedly depend

on the policy of the local chiefs of police, are equally surprising. London accounts for more than half the cases in England and Wales, but in many counties there was not a single prosecution. Nottingham was one of these. In Lancashire there were 280 cases. In Yorkshire, with a population nearly two-thirds as large, there were only 56. Generally speaking, prosecutions for offences connected with prostitution are confined to the larger towns. These figures are for 1930.

That professional prostitution has diminished is probably true. Dean Inge quotes some other clergyman as his authority for the statement that its remuneration has declined. The street-walkers are fewer. But, on the other hand, the number of girls and women who occasionally take up prostitution as a means of getting money or luxuries is almost certainly increasing. The diminution in the number of prosecutions is all to the good. The streets of London and the larger towns are more decent now than in the days when there were ten times as many prosecutions proportionately to population, and a serious temptation to the police is diminished. It is possible for any constable to prevent a prostitute on his beat from practising her trade. As we have seen, the testimony of the person alleged to have been annoyed by solicitation is unnecessary. For practical purposes, the evidence of a constable is always accepted. The mere fact of a man or woman having spoken to each other in the street with reference to immoral relations is not a criminal offence, although they were previously unacquainted. Solicitation is not in itself an offence. But, for obvious reasons, it is very rarely indeed that a man will come forward for the defence, and the evidence for the prosecution goes uncontradicted. The woman usually pleads guilty, and the charges are dealt with in the majority of courts with almost incredible speed. The Street

Offences Committee of 1928 said, with reference to bribery:

"We believe that instances of this must inevitably occur. The general standard of the police is a high one, but in so large a force and in the presence of so much temptation lapses cannot but happen."

They offer no opinion as to the extent to which this evil exists.

There does not appear to be much wrong with the present state of the law, except the temptations presented to the police. As the Report of the Street Offences Committee says in par. 16:

"As a general proposition it will be universally accepted that the law is not concerned with private morals or with ethical sanctions."

The Street Offences Committee considered that the law should be amended so as to make importuning by members of either sex for immoral purposes an offence; importunity to be construed as referring to molestation by offensive words or behaviour. It was also considered that it should be an offence to frequent any street or public place for the purpose of prostitution or solicitation so as to constitute a nuisance, with the proviso that no person should be convicted under this section except on the evidence of one or more persons aggrieved. Mr. W. A. Jowitt, K.C. (now Sir William Jowitt), Miss S. M. Fry and Sir Henry Fairfax-Lucy recommended a proviso to the first section to the effect that words or behaviour should not be considered offensive solely because they expressed a wish or willingness to commit an act of immorality.

These proposals if carried into effect would be an improvement on the existing law, though there would probably be some cases to be decided as to interpretation.

It is necessary, in dealing with this subject, to refer to brothels. A brothel is a place used by persons of

both sexes for the purpose of illicit sexual intercourse. There must be at least two women using the premises for this purpose. A woman cannot be convicted either of keeping a brothel or of permitting premises to be used for habitual prostitution if she receives men for the purpose of prostitution in the premises she herself occupies. A block of flats occupied by different women using them for the purposes of prostitution may constitute a brothel. A place may be a brothel even though the persons resorting thereto are not common prostitutes. For instance, the "house of convenience" described in Mr. Edward Shanks' novel *Queer Street* was definitely a brothel. In practice, proceedings for brothel-keeping are rarely taken unless there are complaints or the place is conducted in an open and disorderly fashion. There were only 257 prosecutions in 1930. About half of these were in the Metropolitan district. The number of cases has fallen in the last twenty years to a fourth, or, proportionately to the increase in population, to a fifth of what it was in the first decade of the present century. There are, I am told, a large number of hotels and boarding houses which wink at illicit intercourse, and are for practical purposes largely used as brothels. Any London policeman could confirm this, and would do so readily enough if he were satisfied that his questioner was not actuated by improper motives. There does not, however, seem to be any real reason to think that the continental system of officially tolerated houses is any better than ours of unofficial toleration. I was told last week by a client that when he was staying a year or two ago at a certain large hotel he was disturbed by a noise late one night, and on looking out into the corridor saw a night porter having a heated argument with the occupier of a neighbouring room. The porter was asserting that the guest had a woman in his room, and it couldn't be allowed. The guest protested

that the occupant of the adjoining room had a similar visitor. "Yes," said the porter, "I know 'e 'as, but it's a double room and that's all right, but yours is only a single room." The problem was solved by the lady emerging and going off in a huff.

CHAPTER V

HUSBAND, WIFE AND CHILD

THE law considers that it is the duty of a wife to live with her husband. It was formerly held that a husband having by law a right to the custody of his wife might if he chose confine her (see Atwood *v.* Atwood, *English and Empire Digest*, Vol. 27, p. 78). This case was referred to in re Cochrane, decided in 1840 (see *English and Empire Digest*, Vol. 27, p. 79), where it was held that a husband might legally confine his wife in his own dwelling and deprive her of her liberty for an indefinite time, using no hardship or unnecessary restraint. It was apparently thought, however, that there ought to be some special reason for the husband depriving his wife of her liberty. Incredible as it may seem, this state of things continued until 1891, when the Court of Appeal overruled re Cochrane in the case of Reg. *v.* Jackson (see *English and Empire Digest*, Vol. 27, p. 79). The facts of this case are worth setting forth. A Mr. Jackson had in 1887 married a woman of independent means. They parted soon after the marriage, though not with the intention of separation, and afterwards the wife refused to live with her husband. On 8th March, 1891, the husband, with the help of two friends, seized his wife as she was leaving church and forcibly carried her away, afterwards taking her to his house and strictly confining her there. I quote the circumstances of her seizure from the judgment of the Master of the Rolls, so that there may be no question of exaggeration:

"The seizure was made on a Sunday afternoon when she was coming out of church in the face of the whole congregation. He takes with him to assist him in making the seizure a young lawyer's clerk and another man. The wife is taken by the shoulders and dragged into a carriage and falls on the floor of the carriage, with her legs hanging out of the door. Her arm is bruised in the struggle. She is then driven off to the husband's house, the lawyer's clerk riding in the carriage with them. The lawyer's clerk remains at the house, and a nurse is engaged to attend to the wife, who is not ill. Obviously the lawyer's clerk and the nurse are to help to keep watch over her and control her."

On these facts counsel applied to the Queen's Bench Division for a writ of habeas corpus. The application was refused without the slightest hesitation, Mr. Justice Cave saying that counsel had entirely failed to show any prima facie case requiring an answer. He refused to grant a rule nisi (i.e. a rule which would only be made absolute, if at all, after the other side had had an opportunity of arguing the matter), saying that such a rule must infallibly be discharged, and adding :

"To grant a rule which must be discharged in the present position in which husband and wife are, would be the very worst thing that could possibly be done. It would tend to unsettle the lady's mind. It would tend to make her believe that the court was going to do that which it was not going to do."

Mr. Justice Jeune concurred, saying that the detention was in no way illegal.

Notwithstanding the very positive opinion of Mr. Justice Cave, the Court of Appeal did what the court was not going to do, and ordered that the lady must be restored to her liberty. The main argument of counsel for the wife was that the old authorities were barbarous and obsolete, and the judgments of the

Court of Appeal are not, on careful reading, very convincing as to the law, in spite of their soundness on general principles. However, they had the power to overrule re Cochrane, and they undoubtedly did so. The majority of the husbands in this country, in my experience, still regard re Cochrane as law, and consider themselves entitled to restrain the liberty of their wives to any extent they may think fit. The working class and the lower middle class constantly act on this belief. Their view is that expressed by Mr. Henn Collins, K.C. (afterwards Lord Justice Collins), that " the husband may confine his wife in his house and even use such violence as may reasonably be necessary to restrain her ". Nor are they meticulous as to the amount of violence.

Incidentally, it is a mistake to suppose that there is some chivalrous tradition, likely to be lost by the grant of the vote and equal rights, which forbids a man to strike a woman. It is exceedingly rare for a dog to bite a bitch under any provocation, and when he does so it is invariably under the influence of great excitement in a free-for-all fight, or in defence of his food. A bitch has, however, no such scruples.

The right of husband and wife to each other's society is a species of property of one in the other which might well be done away with. It is different from a claim for damages against a co-respondent in a divorce suit. In a case in 1639 it was held, following an earlier case, that a husband might sue for an assault upon his wife for damage for loss of her consorting with him (see Anon. (1639), *English and Empire Digest*, Vol. 27, p. 80). Recently there was the case of Place *v.* Searle, in which the Court of Appeal held that anyone who, without justification, induces a wife to leave her husband commits a wrong towards the husband for which he is entitled to recover damages (see *English and Empire Digest*, Supplement 8, Vol. 27, p. 3). This case overruled an earlier one in which

it had been held that for the husband to recover he must show that his wife did not elect to leave him, but was overborne by a stronger will. An uncommonly difficult thing to prove, one would think.

The Married Women's Property Acts have been so long in force that it is regarded as natural that a married woman should have property of her own, and it has been forgotten that in the days of our fathers or grandfathers a husband, subject to a few exceptions, became possessed of all his wife's property. It has always seemed unfair to me, though it is good law, that when a husband and wife are living together money saved by the wife out of money given to her by the husband for household purposes, dress allowance or the like should belong to the husband.

The right of a wife who is living with her husband to pledge his credit for necessaries is well known, but it is not so well known that a woman with whom he is living as a wife has just the same right, and the husband is liable although the tradesman supplying the goods knows they are not married. The presumed authority arises from cohabitation, not marriage. A poor husband with a rich wife is liable for necessaries, unless it can be shown that credit was given to the wife. The unfortunate shopkeeper is in the difficult position that if a wife has been prohibited from pledging her husband's credit, or if she is already provided with necessaries or an adequate allowance, or if she has committed adultery, he cannot as a rule recover, for the presumption of authority will be rebutted. This will be so whether or not the tradesman knew how matters stood. The husband may, however, hold her out as having authority by allowing her to manage his household or by paying for goods which she has previously ordered on credit. In such cases he must give express notice to the person with whom she has dealt. Notice in a newspaper is insufficient. The husband has the right to decide as

to the standard of living which is to be adopted. There does not seem to be much wrong with the law as it stands, although in particular cases it may work hardship. I have never been able to see why a wife should not be entitled as of right to a fixed proportion of her husband's income. On divorce or judicial separation an innocent wife is given a definite sum. The fact that strict legal rights would not in practice be insisted upon in happy marriages does not affect the position. A change in the law to this effect would raise the status of married women and give them a sense of independence which they do not at present possess. The married woman of the lower middle and the working class is in a position of dependence not far removed from slavery. Sometimes it is willing slavery, sometimes not.

A husband is liable in damages jointly with his wife for any wrong unconnected with contract committed by her. This is so even when the wife has separate property, and the unfortunate husband has no right of indemnity against her separate property should he have to pay damages. Thus, should a wife take out her Rolls-Royce car against her husband's wishes, not only cannot he prevent her from doing so, but he may have to pay damages to anyone whom she injures by her negligent driving. Similarly, he may, and often does, have to pay damages for libels and slanders published by her. The husband's liability is joint only, and ceases on his wife's death or if they are divorced or judicially separated, unless judgment has been first obtained. The fact that they are living apart under a deed of separation does not free the husband from liability. A wife appears to be liable for a wrong committed jointly with her husband.

For wrongs arising out of contract a husband is not liable, unless of course he authorised her as his agent. There was a case in 1668 where it was attemp-

ted to put the liability of the husband somewhat high. A wife alleged herself to be a single woman, and thereby got another man to marry her. On discovering the truth, the man sued the true husband for damages, but failed (see Cooper *v.* Witham (1668), *English and Empire Digest*, Vol. 27, p. 217).

An infant is a person who has not completed his or her twenty-first year. A child, for most purposes, is a person under the age of fourteen years, and a "young person" is one over fourteen and under seventeen years of age. A person attains his or her majority on the day preceding the twenty-first anniversary of birth, and not on the anniversary. This was settled law as long ago as 1663. The age of twenty-one is attained as soon as the day preceding the anniversary is begun; it is not delayed until the time of actual birth is reached.

A child less than eight years is not considered by the law to be capable of crime. Children between eight and fourteen years of age may be criminally responsible if they are proved to understand and appreciate what they have done. In the case of rape, however, physical incapacity is a presumption of law in the case of a boy under fourteen, and evidence of competence is not permitted. Infants over fourteen are presumed to be capable of crime, but if under seventeen will usually be tried in the Children's Court for any offence other than homicide. It is too early to form any definite opinion as to the new Children's Courts, but from the slight knowledge I have of them I fear they may suggest to children that the court isn't a bad sort of place after all. I am quite satisfied that it was a mistake to raise the age of "young persons" from sixteen to seventeen. I do not think I am prejudiced by the fact that a murder was committed in my house by a boy of sixteen, but youths of sixteen, especially among the working classes, are certainly not children. It must be remembered that

it is only among the upper and middle classes that the human male retains a childish outlook until eighteen or so, and sometimes to middle age and even later. A policeman said to me the other day that instead of giving a boy a stern talking to and occasionally smacking his head, it was now necessary to take him to a Children's Court for, say, playing football in the street.

"And when he gets there a white-whiskered old fool'll wag his finger at him and tell him not to be a naughty boy again, and the kid'll think it's no end of a game. Learning them not to be afraid of the court, I call it," said he. Unfortunately there are very few magistrates fit to sit in a Children's Court, and the type of woman who gets on the bench is as a rule peculiarly unsuitable. A good many justices appear to regard the Children's Court as a kind of game for the children, giving them an opportunity to play at being criminals, as it were. The precautions about having no uniformed policemen and preserving a sympathetic atmosphere are often amusing to those who know the severe punishments inflicted in the elementary schools, and the way in which children are often thrashed and knocked about and frightened in their homes. Only those who have had to deal with them know how extremely tough some of these juvenile offenders are. I am aware that the Children's Court has purposes other than punishment, but I fear an attempt is being made to put an excellent theory into practice without ensuring the existence of the necessary machinery. The comparative failure of probation is due to similar causes. Another danger which has always existed in the Juvenile Courts since they were first established is the tendency to accept a low standard of evidence. The ideal of the patriarchs who sit in such courts appears to be that of the benevolent despot sitting under a palm tree and deciding cases by intuition. Children feel injustice

much more keenly than adults, and far too often they do not get justice. I have known a case where a boy was arrested on Sunday evening and convicted on Monday morning, notwithstanding his mother's request for an adjournment. To the indignation of the reporters hearsay evidence was admitted against the boy, and he underwent a lengthy cross-examination by the magistrate's clerk, although he had not elected to give evidence. The case was taken up by the British Legion and the conviction was quashed by Quarter Sessions on appeal. This happened less than two years ago and I acted for the appellant. One of the worst features of the case was the pressure brought for the appeal to be dropped, on the ground that whether the boy were guilty or not it would be better for him to be sent away. I have heard a magistrate defend the present law as to "sleeping out" on the ground that it often enables the bench to deal with youths and girls who could not otherwise be brought within their jurisdiction.

Another instance of what sometimes happens in Juvenile courts was reported in *The Times* of 4th January, 1934. The Wisbech magistrates, sitting as a Juvenile Court, ordered five boys of ages ranging from seven to ten years to go to an industrial school until they attained the age of sixteen. The boys had been charged with committing a series of thefts in Wisbech. The local Education Committee officially asked the bench to deal less drastically with the boys, and on receiving a refusal the Committee as private individuals subscribed to an appeal fund. On the hearing of the appeal it appeared that the magistrates had heard the case on the 31st October, the day before the new Children's Act came into force, in order that they might have jurisdiction to do what they could not afterwards legally have done with regard to four of the five boys. They omitted, however, to give the necessary notice to the Education Authority, and

therefore had to hear the case again on 17th November. At this later hearing the former chairman again presided, although under the new Act he was not qualified to sit. It was admitted that the minutes of the hearing on 31st October had been altered. Quarter Sessions quashed both the convictions and the orders, and granted costs to the appellants.

The extraordinary happenings at Mitcham Police-station referred to at the Wimbledon Juvenile Court and reported in the *Daily Telegraph* of 3rd January, 1934, are at the time of writing under investigation, and it is therefore impossible to comment upon them.

A good example of the evil results of well-intentioned reform can be found in Charles Lamb's *Essays of Elia*. In his essay on "Christ's Hospital" Lamb describes the horrors of solitary confinement suffered by children, and remarks:

"This fancy of dungeons for children was a sprout of Howard's brain; for which (saving the reverence due to Holy Paul) methinks I could willingly spit upon his statue."

It is significant that John Howard advocated the use of solitary confinement in order to avoid the contamination of young offenders by association with other prisoners. (For further information on this question see the remarks on solitary confinement in *The Lawbreaker*, by E. Roy Calvert and Theodora Calvert, p. 97.) Incidentally Lamb, writing more than a hundred years ago, refers with horror to the fact that in England women were still occasionally hanged. One may perhaps speculate as to what he would have thought of the hanging of Mrs. Thompson. We are too apt to pride ourselves on the fact that a woman who poisons her husband is no longer boiled alive.

The parent or guardian of a child or young person charged with any offence in respect of which a fine, damages or costs may be imposed may in the case of

a young person, and shall in the case of a child, be ordered by the court to pay such fine, damages or costs, unless the court is satisfied that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person. This order for payment does not necessarily imply a conviction of the child or young person, but the order may be made if the charge is proved. The parent or guardian may in a proper case also be ordered to give security for the good behaviour of the child or young person, or under certain circumstances to enter into a recognizance to exercise proper care and guardianship.

Apart from these provisions a parent is not, unless there is negligence on his part, liable for the wrongs his or her children do on their own account. For instance, where a daughter, aged seventeen, was allowed by her father to keep in his house a dog he knew to be savage, the father was held not to be liable for damage done by the dog, as the daughter was old enough to control the dog (see North *v.* Wood, *English and Empire Digest*, Vol. 28, p. 180). Where, however, a father, after warning of previous damage, allowed his son, fifteen years of age, to keep an air-gun which the father had given him, and the boy subsequently shot another boy in the eye, damages were awarded against him (see Beebee *v.* Sales, *English and Empire Digest*, Vol. 28, p. 180).

A parent is not liable for debts incurred by an infant child, unless he has, expressly or by implication, authorised the debt being incurred. It is impossible to deal here with the innumerable points which arise in connection with an infant's contracts, but generally speaking an infant over seven years of age is liable for a tort, or wrong independent of contract, such for instance as slander. The liability of an infant for slander was decided in 1608, the court holding that *malitia supplet aetatem*, a maxim not altogether clear.

Formerly a father had a right to the guardianship of an infant child, even against the mother, and after his death a guardian or guardians appointed by him acted jointly with the mother, while guardians similarly nominated by a mother to act after her death had their appointment confirmed by the court only on proof that the father was unfit to be sole guardian. Now, however, the rights of father and mother are equal, and the court, in deciding any question as to the custody or upbringing of an infant, regards the welfare of the infant as the first and paramount consideration, although it also considers the rights of the parents. In the case of an illegitimate child the mother is the sole guardian, unless the child is taken out of her custody by the court.

As a rule the father has the right to decide in what religion a child is to be brought up until it attains its majority, and this right continues after the father's death. It is difficult to say what the court will direct should a question as to the religion in which a child is to be brought up come before it. The court will primarily consider the welfare of the infant, but this "welfare" will apparently be spiritual and possibly social, but not pecuniary. Religion in this country means the Christian or Jewish religion, but, being practical above all things, the court recognises that in India there are other religions.

It is possible to interfere with the control of a child by its parents by making the child a ward of the court. This can be effected by settling a small sum of money on the child, followed by an action to administer the trusts of the settlement. In a reported case this was done in order to prevent an infant from contracting an unsuitable marriage. The infant in question, who was nineteen years of age, had fallen in love with a lady many years his senior. The boy's mother settled a small sum of money upon him in order to give the court jurisdiction and then

obtained an injunction to restrain the lady from marrying her son and from having any communication with him (see Dawson *v.* Thompson, *English and Empire Digest*, Vol. 28, p. 342). I have known this procedure adopted in order to enable relatives, who did not approve of the way in which a mother was bringing up her child, to apply to the court in case they wished to interfere. Theoretically the court has jurisdiction over all infants, who are in a sense wards of the court, but in practice the immense powers in respect of wards of the court are exercised only where there is some property.

Technically a ward of the court is an infant respecting whose person or property some proceeding has been taken in the Chancery Division of the High Court. A ward of court cannot be removed from the country without the court's consent, and to remove a ward of court without leave, out of the country or out of proper custody, is contempt of court. The education and religion of a ward of court is under the court's control, and a ward of court cannot marry without the court's consent. The ward, as well as the other party to the marriage, may be committed to prison for marrying without the consent of the court. The court will insist on a proper settlement being made on the marriage of a ward of court. The approval of the Chancery Division of the High Court is required for proceedings to be taken on behalf of a ward of court.

Disputes as to the custody of children are common among all classes. Apart from an order of the court, the father of a child under sixteen years of age has the right to custody, although if the matter comes before the court after the child has reached years of discretion weight will be given to its inclination.

It is an unpalatable fact that affection between parent and child as such is due to tradition and propinquity, not to nature, after the early years of com-

paratively helpless childhood. This can be observed throughout the animal world, most conveniently in the case of dogs, which are educated as well as cared for by the bitch. Once a puppy is old enough to take care of itself it is looked upon in exactly the same way as any other dog. A similar state of things would exist among human beings were it not for teaching deliberately given. In many instances the admiration of the young and helpless for those older and stronger and the friendly feelings which arise from propinquity about as often as dislike does, are attributed to natural affection. In my experience there is quite as much, if not more, love between adopted children and their parents than there is between those who are actually related by blood. Family pride and respect for tradition are not affection for parents. Incidentally it is probable, now that the youth of either sex can be trained to the manners and usages of the upper middle class at comparatively small expense and the money standard has become insecure, that we shall see importance attached once again to questions of birth and breeding in the older and more literal sense.

I do not attempt to account for the non-existence of natural love and affection between parents and children either on the theories of Professor Freud or otherwise. The burden, incidentally, would appear to lie on those who assert its existence. I merely say, with regret, that in a long experience, both in and out of the courts, in which I have had to deal with facts and deeds, not with mere words, I have not observed it to exist. I have often seen love between parents and children, but it has not been due to the blood relationship between them. The importance of this point lies in the way in which the theory of natural love and affection between parent and child has from time to time affected legislation and the administration of the law, and the results which have followed placing reliance upon it. I suppose it is useless for me to

repeat that I am not denying the existence of love between parents and children. Notwithstanding the contrary opinion of many psychologists, I think it is both desirable and a sound basis for family life. What I do deny is that it is founded on blood relationship.

A parent, however wealthy, may leave everything he has to a Cats' Home or any other object he pleases, and leave his children destitute. Not infrequently this is done, and a common evil is the way in which an old and sometimes scarcely half-witted man or woman will keep a family of children miserably under control fearing to call their lives their own. Mr. Galsworthy wrote a story regarding one of these tyrants, and such a situation has served as the introduction to countless novels and tales. The right of free disposition by will has helped to emphasise the domination of the young by the old which is an unfortunate feature of English business. The power of a wealthy parent over children is almost unfettered. There are no inspectors to intrude, and no questions as to school attendance and education. It is possible for a parent to bring up sons or daughters in such a way that it is impossible for them to earn their own living, and then leave them stranded and helpless, possibly at an age when they have no chance even of making a start with outside help. A useful bill dealing with the right of disposition by will and enabling an application to the court to be made on behalf of dispossessed members of the family has been introduced in Parliament but it is doubtful whether it will pass into law.

Except under the poor law, to prevent a burden upon the rates, there is no legal obligation upon a parent to maintain a child unless in the case of a child under sixteen years of age neglected to such an extent as to bring the matter within the criminal law.

In the case of Waterhouse *v.* Waterhouse (see *English and Empire Digest*, Vol. 28, p. 216), Mr. Justice Buckley

expressed his views on the relationship of father and son, and the result of the case will be surprising to most laymen.

The facts of the case were that a retired doctor had a son thirty-five years of age, strong and able-bodied, and qualified as an architect, who declined to do any work or take steps to earn his living. The father had offered his son an allowance for his maintenance away from home, and had forbidden him the house. Notwithstanding this prohibition, the son insisted in living at home at his father's expense. The father was unable to turn his son out or to prevent him from entering. Under these circumstances the father applied to the court for an injunction to prevent the son from remaining in or entering upon the house. The injunction was refused, Mr. Justice Buckley saying:

" The facts alleged in this case are far from justifying an order that a son shall not enter his father's house. The duty of a father towards his son does not come to an end when, by reason of the latter having attained his majority or having reached a riper age, he may be properly called upon to provide for himself. Even when a child is an infant the parent's duty to provide maintenance and education is of imperfect obligation and whether in a court of law or of equity its direct enforcement may be difficult or impossible. But the duty arising from the relation of parent and child, whether directly enforceable or not, is a duty of which the parent can in no circumstances divest himself. The duty is not limited to providing maintenance during infancy or any other time. It is a duty so to conduct himself in all respects towards his child as is right in him, he being his father. . . . The court as between father and son regards not merely obligations which are legally enforceable, but obligations which arise from the relations between the parties—obligations which are not legal, but may be called moral. . . . No mis-

conduct of the son, however, can abrogate the duty of the father. There might be a case in which the father might be entitled (say for the proper discharge of his duty to others) to forbid his son even to enter his house. But except in very grave circumstances this court would never make an order with the intent and result of severing the connection which ought to exist between parent and child."

These were the views of an eminent judge of the High Court as recently as 1906. Apparently nothing short of an attempt on the part of the son to seduce the housemaid would have had any influence on the court. It is strange that Mr. Justice Buckley failed to see that the son's presence in the house rested entirely on his superior physical force, and that the remedy to which he was driving the father was the engagement of a " chucker-out " to remove his child.

Some years ago I obtained an injunction in the County Court against a son restraining him from going into his father's house. The son had several times been convicted of assaults upon the father, but the facts were otherwise somewhat similar to those in Waterhouse *v.* Waterhouse. The son went to prison for some months for repeated breaches of the injunction.

Under the poor law the father, and after his death the mother, is liable to maintain a child who cannot support him or herself. The grandfather and grandmother are also liable if they have the means. A man who marries a woman with children, legitimate or otherwise, takes over the liability under the poor law to maintain them as part of his family until they are sixteen, or the mother dies. A legitimate child is liable to maintain its parents, should they become chargeable to the poor law, but an illegitimate child is not, nor is a grandchild liable to maintain its grandfather. These liabilities, except in the case of a

husband who takes over his wife's children, extend only to blood relations.

Any insurance company dealing with claims by dependents in respect of fatal accidents under the Workmen's Compensation Acts or otherwise will tell you of the amazingly dutiful behaviour alleged in such cases. Sons living at home, of whatever age, apparently contribute their entire earnings to the support of the household, keeping only a few pence for themselves as pocket-money. Inquiries made in connection with the application of the means test usually reveal a less generous spirit.

The way in which the means test is administered frequently causes extreme hardship where the earnings of sons and daughters are included in estimating the family income. It is a hard thing for a middle-aged man, who has always earned his own living up to the present trade depression, and more likely than not has served in the war, to become dependent for every halfpenny upon a young son or daughter. It often results in the break-up of the home. This kind of thing is much more humiliating than to be granted relief which is subsequently recovered from the children. I met with a case recently where on unemployment pay being stopped the man committed suicide, leaving a note to his wife saying that he " could not stop to sponge on you and the kids ".

The right of a parent or guardian to the custody of a child is protected by the criminal law, which provides severe punishment for abduction. The offences and punishments vary according to the age and sex of the child.

Shortly, there are four offences as to taking children from the person having their lawful custody. First, taking away a child under fourteen, of either sex. Secondly, taking away an unmarried girl under sixteen. Third, taking away an unmarried girl under eighteen with the intention of her being carnally

known. Fourth, taking away an heiress under twenty-one for her to be married or carnally known. The last-named offence is subject to the heaviest punishment of any.

Most people will remember the abduction of Rachael Wardle by Jingle.

" 'Get on your bonnet,' repeated Wardle.

" 'Do nothing of the kind,' said Jingle. 'Leave the room, sir—no business here—lady's free to act as she pleases—more than one-and-twenty.' "

The question of the marriage of infants often arises, and it is usually a difficult thing to advise parents upon. Readers of Meredith's *The Ordeal of Richard Feverel* will remember the long discussion between various members of the family as to what was to be done with regard to Richard's marriage with Lucy, ending in the correct conclusion that they were helpless. Parents can forbid the marriage of their children, but should the children manage to get themselves married the marriage cannot be undone. Moreover, the court can override the parents' refusal to consent, and successful applications to the magistrates for this purpose are often made.

CHAPTER VI

DIVORCE AND SEPARATION

MONOGAMOUS marriage is practically the same thing everywhere, so far as the legal aspect is concerned. The sacramental view is unaffected by the law. But while the status of the parties is similar all over the world during the continuance of the marriage relationship, the possibility of bringing the contract to an end varies widely. In the United States of America, the country whose civilisation and social customs approximate most nearly to our own, the divorce rate per hundred marriages is 16 per cent., or about one in six. Here it is 1·3 per cent., or one in seventy-five. There is no such difference in sexual morality or social custom as would even partly account for such a difference. In actual fact it means that marriages here, which are for practical purposes ended, still continue in the eyes of the law.

Very shortly the present position is that either husband or wife can obtain a divorce on proof that the other party to the marriage has committed adultery on or after 18th July, 1923. Unnatural offences may also be a ground for divorce.

A judicial separation may be obtained on grounds that would support divorce, and also for cruelty, desertion for two years at least without cause, or for non-compliance with a decree for the restitution of conjugal rights.

A marriage may be annulled on the ground of incapacity for sexual intercourse.

A marriage may be found to be invalid from the

beginning by reason of the insanity of one or both of the parties at the time of the marriage, but subsequent insanity, however hopeless and long continued, is not a ground for divorce. This issue has been deliberately shirked by the House of Commons. The extent to which M.P.s are afraid to antagonise ecclesiastical opinion is not unlikely to bring about anti-clerical feeling such as exists to varying degrees in all continental countries and especially in Spain, Russia and France.

Although incapacity for sexual intercourse is a ground for annulling a marriage, the wilful and permanent refusal of sexual intercourse is not. In accordance with the peculiar principles which govern our divorce laws, if a wife refuses sexual intercourse without reasonable excuse her husband is not guilty of desertion if he leaves her, but he may be divorced if he has sexual relations with any other woman.

The absurdities of our divorce law have been so often and so ably expounded that it is unnecessary to deal with them here. Few people can be unaware of the fact that if both parties to a marriage wish to bring it to an end and both are living in adultery, it was at one time impossible, and is still in the highest degree improbable, for either to obtain a divorce. No logical defence of the present state of the law is possible, but change has been prevented by the timidity of Members of Parliament in the face of the opposition of an unreasoning minority who hold that all divorce is wrong. This minority are able to delay reform because the enormous majority on the other side is unable to come to an agreement as to how far reform shall go. It seems impossible to get the opponents of divorce to understand that no one is advocating that divorce should be made compulsory against the wishes of both parties to a marriage, and that when one or both of the parties genuinely and strongly desires a divorce the marriage, for both

spiritual and material purposes, is at an end, and the fact might as well be realised by the law. I remember ten years or so ago I was living in a mining village and certain church workers were going about telling the miners' wives that, if the Divorce Law reformers had their way, husbands would be able to desert their wives and then divorce them on the ground of desertion. Judging from one or two of the aforesaid church workers whom I met, they may very possibly have believed what they said.

There is no difficulty about a collusive divorce when both parties desire it and are indifferent to the inevitable publicity. I have known a case in which a husband was obliged to commit adultery a second time, because no one at the hotel where he spent a week-end with a lady not his wife could identify him on the first occasion. He grumbled a good deal about it, I remember, and horrified his wife's highly respectable solicitor by telling him that he intended to forward an unpaid hotel bill the next time and refer the woman to his father-in-law.

To illustrate the difficulty of advising as to whether the evidence can safely be taken as proving adultery, take the following story, which was told me the other day by counsel for the wife in the case. It was actually an application before the magistrates, but adultery was the issue involved. The husband with a private detective, in consequence of " information received ", watched the house in which his wife lived, and soon after midnight broke in through the cellar-flap and rushed upstairs to the wife's bedroom. There they found his wife in night attire standing by the bed from which the lodger was in the act of rising. Fully satisfied, they retired. There was only one other bedroom, which was occupied by two boys of twelve and seven. The husband applied to the magistrates to set aside a separation order which had been obtained by the wife and evidence of the before-

mentioned facts was duly given and accepted. The simple explanation given by the wife, and corroborated by the lodger and the eldest son, was, however, as follows. The lodger was in the habit of sleeping in one of the beds in the boys' room, the two children occupying the other. On the night in question, one of the children complained that he was feeling ill, and the wife went to sleep in the children's room, the lodger exchanging to hers. She was waked by hearing someone getting into the cellar, and in alarm got up and went to rouse the lodger, with the result that she was found in apparently compromising circumstances when the husband and the detective rushed upstairs. The magistrates accepted the wife's evidence. I am not suggesting that they were wrong. But the story shows the difficulty of advising on evidence in such cases.

An indefensible position which often arises under the present state of the law is that a judicial separation may be obtained on evidence that would justify a divorce, but instead thereof. This is often done by Roman Catholics. As a result the parties are separated as completely as by divorce, but neither is free to marry. Judicial separation may be justifiable when grounds are not sufficient for divorce to be granted as the law now stands, but not otherwise.

In a divorce suit what is called a decree nisi is pronounced. This strange procedure means that a decree is pronounced that the petitioner has proved his or her case and that the marriage be dissolved, or in the case of nullity, be declared to be null and void " unless sufficient cause is shown to the court why this decree should not be made absolute within six months from the making thereof ". This interval of six months gives an opportunity for the King's Proctor to intervene and show cause why the decree nisi should not be made absolute. After the expiration of the six months the party in whose favour the decree nisi has

been made may apply to have the decree made absolute. No other party can apply, the only remedy in case the person entitled does not make the decree absolute being to apply to a judge to have the decree nisi rescinded and the suit dismissed for want of prosecution. This rule, like many others in connection with our divorce system, operates very unfairly, and enables a petitioner in effect to blackmail the other parties if, as is usually the case, they desire the marriage to be dissolved. After the decree absolute the court has power to inquire into and vary any settlements there may be.

The above is a very rough outline of divorce proceedings, and there are a number of incidental points to which reference must be made. The first of these is the custody of the children.

In dealing with the question of the custody of children the court regards the welfare of the infant as the first consideration, and custody may be given to some person other than the parents. After the decree absolute, custody is usually granted to the "innocent" party, but when the children are very young, or for other good reason, it may be given to the guilty. Formerly it was customary to deprive a mother who had committed adultery of access to her children, actually, though not admittedly, as a punishment. Custody is as a rule given until a boy is fourteen or a girl sixteen years of age, but the court has power to deal with the matter until a child is twenty-one. The court cannot, however, make an order in respect of a child over sixteen years of age contrary to the wishes of the child, unless the child is a ward of court.

The next point is the question of provision for the wife's maintenance. This allowance for maintenance when ordered during the course of a suit is called alimony pending suit, or pendente lite; after judicial separation, permanent alimony; after dissolution or

nullity, permanent maintenance; and after a decree for restitution of conjugal rights, periodical payments. An inquiry as to the means of the parties is held before the registrar, and the amount allotted in respect of alimony pending suit is usually such a sum as will make the wife's income equal to one-fifth of the joint income of the parties. For example, the husband's yearly income being £900, and the wife's £100, the husband would probably be ordered to pay at the rate of £100 a year so as to bring the wife's income to £200. No order for alimony pending suit will be made if the husband be a bankrupt or have no income or if payments are being regularly made under a deed of separation. Permanent maintenance is dealt with in a manner similar to alimony pendente lite, but the proportion of the joint income given to the wife is a third instead of a fifth. In either case there may be additional provision for the children of the marriage.

In estimating income all charges thereon are taken into consideration, but property, such as valuable jewellery, which does not bring in anything may be taken into consideration in respect of the income which might be obtained were it to be sold and the proceeds invested. The court has the widest discretion as to the amount allowed and the one-third rule mentioned above is by no means invariably followed.

An order for maintenance may be, but usually is not, made so as to remain in force until the wife marries again or while she continues to live a chaste life (*dum sola*, and/or *dum casta*, *vixerit*). The *dum casta* clause is very rarely inserted, as it is considered an insult to the wife; it is hard to see why, for one would think that the insult would lie in suggesting that she would object to such a clause. As a result husbands may be compelled to continue payment to women who have remarried or are living with another man.

Permanent maintenance may be increased or decreased on the application of either party by reason of a change in the husband's means, but apparently a husband cannot apply for variation should his former wife's private means increase. Even a guilty wife may be allotted maintenance, but this is usually obtained on the decree nisi, and not in the ordinary way. Bankruptcy does not release a husband from liability to pay alimony or maintenance.

After the decree absolute the court may inquire into ante-nuptial or post-nuptial settlements made on the parties, and may vary them at discretion. A deed of separation not expressed to be determinable on the wife's ceasing to live a chaste life remains in force until varied by the court, and a husband who overlooks his liability under such a deed may be compelled to pay the allowance due to his wife thereunder, even though the decree has been made absolute and the wife has re-married. I have known this happen. Even though application to vary such a deed of separation be made, it by no means follows that the husband will be relieved of all liability thereunder.

In the Divorce Court costs do not follow the event, and are entirely within the discretion of the Judge. A successful wife always gets an order for costs, and in addition to the costs allowed on taxation her solicitor may recover costs reasonably incurred in the course of the proceedings from the husband as necessaries for which the wife was entitled to pledge her husband's credit. She may also get an order for costs against the woman with whom her husband has committed adultery provided the woman is joined as a respondent.

A wife who has not sufficient separate estate may usually get an order for security for costs against her husband, whether she is a petitioner or respondent. She will then usually be awarded costs up to the amount secured even when unsuccessful. Unless

she has committed adultery the solicitor for even an unsuccessful wife may be able to recover costs against the husband as necessaries, apart from any order or security. If, however, the wife has committed adultery, even though the solicitor may be unaware of it, he has no remedy against the husband at common law, for the authority of a wife to pledge her husband's credit for necessaries ends when she commits adultery.

Costs may be given against a wife who is possessed of separate estate, and also against a co-respondent.

The costs of even a simple undefended divorce suit come to about £60 or £70, and a defended case may of course cost almost any sum.

Damages may be given against a co-respondent to compensate a husband for the loss of his wife. The law in theory considers that damages should not be punitive or vindictive. A wife cannot claim damages in a divorce suit against the woman with whom her husband has committed adultery. The following is an extract from the headnote of Butterworth *v.* Butterworth, decided in 1920, in which case the assessment of damages was exhaustively considered.

" The grounds on which damages are given are: the actual value of the wife lost; compensation to the husband for the injury to his feelings; the blow to his honour, and hurt to his family life. The value of the wife has two aspects: (*a*) pecuniary, and (*b*) what may be called the consortium aspects: (*a*) depends upon her fortune and her ability and assistance in the home or business; (*b*) depends upon her character and abilities as a wife or mother. The conduct of the adulterer has little bearing on (*a*) but may be very relevant as to (*b*) as an aid to estimating the value of the wife, the ease with which he effected his purpose may show that the wife was of small value. His conduct may also be relevant in estimating the injury to the husband's feelings." (See *English and Empire Digest*, Vol. 27, p. 452.)

This kind of thing sounds antediluvian to most women and to many men. It seems incredible that any decent man could be willing to take damages for the loss of a wife, and the kind of man who would wish to obtain them should not be encouraged by the law. It would be better to make damages punitive, or to provide that they should go for the benefit of the children of the marriage, if any, or the divorced wife in some cases, at the discretion of the court. I do not think that a co-respondent should in any case pay damages if he marries the respondent. So long as the institution of monogamous marriage remains it will be necessary to retain some check on the activities of persons who break up a marriage wantonly. It should be remembered, however, that a marriage may be, and often is, wrecked by an outsider without adultery being committed, and without any sort of remedy, even by the ridiculous action of enticement.

Where a petitioner has himself committed adultery he will not be given damages, nor in practice will damages be given against a co-respondent who did not know the woman was married. In Butterworth *v.* Butterworth it was laid down that "the damages, if any, have always been compensatory only, and not exemplary or punitive", but in practice the behaviour of the co-respondent is always taken into account, and if he has been guilty of treachery or other dishonourable conduct it weighs heavily against him when the damages are assessed.

What constitutes desertion is often a difficult question. In Halsbury's *Laws of England*, Vol. 16, p. 481, it is said:

"It is desertion if one party to a marriage, without the consent or against the will of the other, wilfully, without cause or reasonable excuse, makes the other live apart for two years or more; but this definition is not exhaustive."

There may also be desertion as a result of non-compliance with a decree of restitution of conjugal rights, and for the purposes of the summary jurisdiction of the magistrates in matrimonial cases desertion need not last for two years or any other specified time.

Since adultery by itself became a ground on which a wife could obtain divorce, desertion is no longer so important as it used to be, but not only solicitors, but most clergymen, ministers of religion, doctors and social workers, are constantly being asked by women whether they will be justified in leaving their husbands. For practical purposes the answer is that they will be foolish to do so unless there has been adultery or cruelty on his part. In the case of adultery it is necessary to avoid the common mistake of advising a wife that she is entitled to leave her husband on discovering that he has committed adultery, even though she does not intend to commence proceedings for divorce or judicial separation. Apart from the fact that suspicion is often mistaken for proof, in order to be safe in leaving her husband a wife should request her husband to give up the adulterous connection complained of. Should he refuse or fail to do so she will be justified in leaving him, and he will be held to have deserted her. This point is, however, only of importance where the woman contemplates proceedings before the magistrates.

Cruelty, like desertion, is no longer as important as it used to be. Legal cruelty is conduct of such a kind as to cause danger to life, limb, or bodily or mental health, or to give rise to reasonable apprehension of such danger. Each case has to be judged on the particular facts and the circumstances of the parties.

Condonation, which is a bar to proceedings in respect of a matrimonial offence, has been defined as " the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole

being done with knowledge of all the circumstances of the particular offence committed" (see Sneyd *v.* Sneyd, *English and Empire Digest*, Supplement No. 8 to Vol. 27, p. 20). Condonation operates as a conditional waiver of the right to take proceedings, and the offence which has been condoned may be revived by subsequent misconduct. Resumption of sexual intercourse by the husband, with full knowledge of the facts, is conclusive evidence of condonation by him, but such intercourse by the wife is not conclusive against her. The offence by which condoned misconduct is revived need not be of a nature similar to that condoned.

Collusion occurs where there is an improper agreement between the parties to a suit with regard to its initiation or carrying through. It is often hard to say whether or not a course of conduct will be held to be collusive. There must be some improper act done, or an improper refraining from doing an act, for a dishonest purpose, but it is sometimes difficult to say what is improper. For instance, a request by a proposed petitioner for production by the proposed respondent of evidence of past misconduct does not in itself amount to collusion, but an arrangement for a husband or wife to commit adultery in order that a petition might be presented would certainly be collusion.

The peculiar jealousy of the law with regard to the possibility of collusion is well shown in the case of Farnham *v.* Farnham (*English and Empire Digest*, Vol. 27, p. 297). In this case it was proved that a man identified as the husband had spent two nights in a bedroom at an hotel with a woman not the petitioner. Lord Merrivale refused to accept this as evidence of adultery, saying, "This may be a very self-respecting man, who would not think of consorting with a loose woman. He wants to be divorced. I must be satisfied that he has committed

adultery. I tell you frankly this evidence does not satisfy me."

I do not know whether his Lordship had been studying Mr. G. B. Shaw's play *Getting Married.*

In the case of Scott *v.* Scott (*English and Empire Digest*, Vol. 27, p. 334), the facts were that the wife had obtained a decree of judicial separation on the ground of desertion with permanent alimony at the rate of £160 a year. She told her husband's brother, through whom it was paid, that the allowance was insufficient for herself and her daughter, and was thereupon informed by him that if she would institute proceedings for divorce, the necessary information for which would be supplied, her husband would pay her a sum of £300 down on the filing of the petition, another £300 on the decree being made absolute, and £500 a year by way of permanent maintenance in lieu of the £160 a year theretofore paid as permanent alimony. It was held that under the circumstances there was no misconduct on the part of the petitioner in consenting to these proposals, and a decree nisi was pronounced.

The general rule as stated in Carmichael *v.* Carmichael, decided in 1925 (see *English and Empire Digest*, Vol. 27, p. 332), is that every transaction either between the parties or between their legal advisers during the pendency of divorce proceedings, which makes the material elements of a decree of divorce the subject of negotiation, taints the transaction with suspicion of collusion, and must be avoided by both parties and by their representatives.

Lord Reading, when Lord Chief Justice, expressed the opinion that when parties agree together to take steps to obtain a divorce by suppressing or concealing facts from the court they are guilty of a criminal offence, and any solicitor who assists the parties is also guilty of a criminal offence. It is of course impossible to say in how many instances the aforesaid

criminal offence is committed, but it is significant, as showing the view of the Divorce Division as to the position, that all cases in which the only charge of adultery is one with an unknown woman at an hotel must be heard in London. There is an exception to this rule in "Poor Persons" cases proceeding in a district registry, but on what principle the exception is founded it is hard to say. It is probable that a large number of divorces are collusive and in one instance a Member of Parliament openly boasted that his had been.

Connivance, like collusion, is a bar to divorce. It exists where the husband either consents to his wife's adultery, or tolerates or induces conduct which is likely to result in adultery. It is difficult to distinguish between connivance in, and conduct conducing to, adultery. Conduct conducing is not an absolute but a discretionary bar to a decree. The attitude of the court depends very much on the history of the parties. If, for instance, the husband knows his wife to be of loose morals, either from the facts of her previous life or from his having seduced her before marriage, he would be bound to take exceptional care to prevent her being led into temptation. Where, with the acquiescence and active co-operation of her husband, who was domiciled in England, a wife obtained a decree of divorce in South Dakota, which was invalid in this country, and remarried, the husband failed in a petition for divorce founded on his wife's adultery in remarrying after the American decree. The husband knew that his wife would remarry if she obtained a decree, and the court was not satisfied that he believed at the time that the American decree would dissolve his marriage. It was held that the husband had connived at his wife's adultery, and that even if his conduct did not amount to connivance it was certainly conduct conducing to adultery, and the court would not have exercised its discretion in his favour.

The King's Proctor is an official who may intervene at any time during a divorce suit, but in practice very rarely does so until after a decree nisi has been pronounced. Up to the last moment before the decree absolute is pronounced the King's Proctor may enter an appearance and in due course show cause why it should not be granted, by reason of collusion or the withholding from the court of material facts. The whole business is deplorable, and must be distasteful to everyone employed in the King's Proctor's office. The inquiries which are made of neighbours, landladies, and servants, and in the bars of hotels and public-houses, naturally have the effect of causing scandal and distress to innocent as well as guilty parties. There seems no good reason for retaining the six months' interval between the decree nisi and the absolute, nor for keeping up the office of the King's Proctor. The only result is to keep people tied together when they are better apart, and to increase immorality. The ordinary law as to perjury is considered sufficient to prevent the courts being trifled with in other cases, and would be in divorce, were it not for the state of confusion induced by obsolete ecclesiastical influences and the refusal openly to consider sexual matters which is so prevalent in England and Wales. Scotland is saner in these things, and Ireland more logical.

I have dealt at some length with the question of divorce, as I have found in practice that most amazing misapprehensions exist, of which the most common is that a wife who divorces her husband is thereby left penniless without any claim on him for herself or her children.

It is, however, when we come to consider the working classes that we find the greatest hardships. "Poor Persons" divorce has been a good thing, but it scarcely does more than touch the fringe of the matter. It is available only to those whose income does not

exceed £4 a week in London and £2 elsewhere, and a "Poor Person" must not be worth more than £50 or at the outside £100, excluding wearing apparel and tools of the trade. Even within these limits leave is not by any means sure to be granted, and it is available only in clear and simple cases. Obtaining evidence of adultery usually costs money. Anyone who imagines, by the way, that our ponderous safeguards against freeing persons from a broken marriage bond are always regarded seriously, should go to Assizes and see the "Poor Persons" list being rattled through. It is a pretty commentary on the attitude of the courts towards divorce, and incidentally towards work at Assizes, that a suit for divorce where the exercise of the discretion of the court is sought in respect of adultery by the petitioner, must be dealt with in London, because it is said that the matter is regarded as one of extreme gravity. There is an exception in the case of Poor Persons, for whose benefit discretion may be exercised at Assizes. Not long ago I heard "discretion" exercised at Assizes in an undefended "Poor Persons" case. Very junior counsel put the petitioner in the box, asked her a few questions, and sat down. The Judge, fortunately in an amiable mood, blandly inquired from counsel if he were not asking for discretion to be exercised in favour of the petitioner. "Yes, m'lud," replied counsel uncomfortably. "The court requires some material upon which to exercise its discretion," said his Lordship. Counsel accordingly rose, and having inquired from his client whether she had committed adultery, and with whom, sat down again. The Judge sighed audibly, then asked the petitioner how often she had misconducted herself, and whether the man would marry her if she were divorced. Upon receiving an affirmative answer to the latter question his Lordship glanced at the clock, and said he should exercise his discretion in favour of the petitioner. When the

parties are in a better social position the court considers it necessary to go much more fully into the circumstances; it is not altogether clear why.

For the matrimonial difficulties of the working and the lower middle class the only court available is the "Police Court". So far does the criminal atmosphere enter into matrimonial cases heard in the Courts of Summary Jurisdiction that I have often heard a separation order included in a list of previous convictions read out by the police! I mean included as a conviction, not mentioned as something known.

The law is heavily in favour of the woman. A married woman may apply to the court for an order on the ground of her husband's persistent cruelty to herself or her children, of desertion, of failure to provide reasonable maintenance for herself or her infant children whom he is liable to maintain, of conviction for certain serious assaults, of habitual drunkenness, as defined by statute, of his having insisted on sexual intercourse with her while he knew himself to be suffering from a venereal disease, and of his compelling her to submit to prostitution. It is further enacted that where the husband has in the opinion of the court been guilty of such conduct as was likely to result and has resulted in her submitting herself to prostitution, he shall be deemed to have compelled her to do so.

A husband can only apply when his wife is an habitual drunkard as defined by statute, or is guilty of persistent cruelty to his children.

A Court of Summary Jurisdiction, which, as we have seen, means the magistrates sitting in the "Police Court", or a Stipendiary magistrate, may, on proof of the grounds aforesaid, make an order containing any or all of the following provisions:

(*a*) A provision that the applicant be no longer bound to cohabit with the husband or wife, which

while in force has the effect of a decree of judicial separation on the ground of cruelty.

(*b*) A provision for the legal custody of any children of the marriage.

(*c*) A provision that the husband shall pay to the wife personally or for her use to any officer of the court or third person on her behalf a weekly sum not exceeding £2 and a weekly sum not exceeding 10s. for the maintenance of each child whose custody is given to her until such child attains the age of sixteen years.

(*d*) A provision for the costs of the court and the parties.

It is further provided that no order shall be made on a wife's application if it shall be proved that she has committed adultery, unless the husband has condoned or connived at, or by his wilful neglect or misconduct conduced to, such act of adultery.

The law is thus both unfair and incomplete even were it perfectly administered. A wife can apply on a number of grounds, a husband on two only, and both of these very difficult to prove. Moreover, a husband cannot get an order for payment by his wife of any sum, whatever her means may be. This may cause grave hardship, for there are many men crippled by war or accident, and without pension or compensation, who cannot afford to maintain children the custody of whom may be given to them. There is the further absurdity that the magistrates may, and commonly do, try the issue of adultery, yet they cannot grant divorce.

The magistrates who deal with the vast majority of matrimonial cases are usually old men originally appointed for political reasons, almost invariably prejudiced one way or the other, and generally in a hurry. By reason of the fact that the chairman of the justices, who usually dominates or ignores his colleagues, is appointed by seniority, the outlook of

the average bench upon all social, and especially sexual, matters is that of the last generation but one. Because of the deafness of a large proportion of chairmen the employment of an advocate, who will both shout and make his witnesses shout, is an advantage even greater than usual. Because of the self-importance which too often accompanies successful old age a deferential humbug will usually be believed, while a man or woman smarting under a sense of wrong, and indignant or voluble in consequence, stands little chance. A week or two ago I listened to such a case. A wife had been, she said, continually knocked about by a jealous husband. Her story was corroborated by her father and mother, who had frequently been shown their daughter's bruises, and given her shelter for the night, when she had been, as she said, assaulted by her husband. The man was represented by an experienced advocate, the woman had no one. One assault, which had caused the final break, had to be admitted, but jealousy was put up as an excuse. The woman's mother was, naturally enough, furious at the way her daughter had been knocked about. She showed this in the witness-box, cried that whatever the magistrates decided, she would never let her daughter go back to " that brute ", and was severely reprimanded by both the chairman and the magistrates' clerk for interrupting them when they lectured her. The chairman was about seventy-five, and old for his age. It was easy for the advocate to put the blame for everything on the mother-in-law, and in the result an ill-used woman was refused any remedy. Even more often a husband, unrepresented and upset by hearing the other side of the case put before the court, makes one or two angry interruptions, is sternly ordered to be silent, and relapses into sulky silence when it comes to his turn to ask questions or give evidence. Incidentally, an appalling amount of licence is given to advocates in many courts to make state-

ments in their opening addresses which they are well aware cannot be justified by subsequent evidence. I remember last year in one of the most important "Police" Courts in this country commenting in my opening for the defence in a separation case upon the discrepancies between my opponent's opening and the evidence he called. "Oh," said the magistrates' clerk, "you needn't trouble about that. We never pay any attention to Mr. So-and-so's opening." Which was only partially consoling. Mr. So-and-so has for many years probably made the largest income of any police-court advocate outside London, and what he does not know about the tricks of advocacy before the justices is not worth knowing.

A few hours before this was written I was in court on the hearing of an adjourned application for a separation order on the ground of desertion. The Court Missioner, who had made an attempt to reconcile the parties, was asked for his report before anything else was said. He was not called as a witness but merely expressed his views. The wife was then sworn and examined by the clerk. The husband was told he could ask questions, and was constantly interrupted when he tried to do so, the clerk exercising his wit at the expense of the man's manner of speech. The woman's evidence was not corroborated, no other witnesses being called. The husband was then asked what he had to say, and he made a statement under continuous interruption by the clerk and the chairman. He was neither sworn nor told that he could give sworn evidence. A conference then took place between the clerk and the chairman, the Court Missioner joining in. I heard the clerk say that the evidence was very thin, but an order for payment of 10s. a week was made. There were a large number of cases on the list. This is typical of what happens in the "Police Courts". It is usual to adjourn a case where no solicitor appears, and it is often done when

the parties are legally represented, the husband being ordered to pay his wife a weekly sum. This is supposed to give the Court Missioner an opportunity to reconcile the parties. What frequently happens is that the man, smarting under the grievance of having, as he not unnaturally considers, been condemned unheard, does not pay, and refuses to see the Missioner. It may easily be imagined what chance he has on the adjourned hearing.

On the actual hearing the odds are heavily in favour of the woman, especially if she is young and reasonably good-looking. The susceptibility of the aged is notorious, and the justices are well aware that for practical purposes there is no appeal from their decision. In industrial districts it is common for factory girls to marry with the full intention of getting a separation order if they find they do not care for married life. With the assistance of a convenient sister or mother to provide corroboration an order can be obtained without much difficulty. The justices seldom take into consideration the potential earning power of the wife, and she gets a weekly payment sufficient to keep her. In a short time she goes back to work, and does very well indeed on her earnings and court allowance. It is true that in theory the husband can apply to have the order varied, but he rarely knows this, and even when he does he is often in arrear and is refused permission to apply.

When the bench are satisfied that an order should be made, it must, according to law, be such as " the court shall, having regard to the means of both the husband and wife, consider reasonable " (Summary Jurisdiction (Married Women) Act 1895, Sec. 5 (*c*)).

The kind of thing magistrates " think reasonable " is well exemplified by the case of Cobb *v.* Cobb (*English and Empire Digest*, Vol. 27, p. 558). Although decided in 1900, the facts are similar to those constantly occurring now. The husband, who was over

sixty years of age, gained a precarious living as an outside porter. His income varied from 23s. to 25s. per week. The justices made an order of £1 a week. The order was appealed against, and the High Court sent the case back to the justices for further consideration, with the result that they made the same order again. After the husband had undergone two terms of imprisonment for not doing what he obviously could not do, the justices reduced the amount of the allowance from £1 to 12s. a week. The husband again appealed, and the High Court reduced the order to 8s. a week, the President saying that Courts of Summary Jurisdiction would be well advised to act upon the principle of the Divorce Court of allowing the wife one-third of the joint income. In this case charitable persons helped the unfortunate porter to appeal. Lest it should be thought that such things do not happen now, I may add that the report of the Brixton Prison Discharged Prisoners Aid Society for 1931 stated that many men are ordered to pay amounts which are impossible even when they are in full work. That orders are constantly made which are not only unfair but beyond the husband's power to pay is shown by the closeness with which the figures of committals to prison for non-payment of maintenance followed those of unemployment until the recent enormous increase in the latter (see article " Debtor Prisoners " by Miss S. M. Fry, J.P., in *The Magistrate*, October–November 1932). Time after time I have seen and heard orders made which it was obvious the man could not pay. Magistrates as at present chosen and appointed are not as a rule fit to exercise any discretion, but the High Court has gone out of its way to say that the Justices can do as they think fit in matrimonial cases. The following are the facts of the case of Rex *v.* Richardson, *ex parte* Sherry, decided in 1909 (see *English and Empire Digest*, Vol. 27, p. 564). In October 1908 a man was committed to

prison for three months for non-payment of maintenance arrears. This wiped out the arrears for which he was committed, but, incredible as it may sound, on being discharged from prison he was arrested on another warrant for non-payment of the money that had accrued due during the three months he had been in prison, and for non-payment of these fresh arrears he was again committed to prison for six weeks. No evidence was given that the man had any means whatever. The High Court held that the magistrates had power to do what they had, Lord Alverstone, the then Chief Justice, saying, " It might be strange if a man was sent to prison again immediately after coming out, but the justices may do so if they think fit." His Lordship immediately added that " imprisonment must only be ordered in circumstances in which they think that the defendant ought to be punished for non-obedience to the original order ". What his Lordship meant by his second observation Heaven and he may have known, but it is not clear to the ordinary man. The arrears to the date of imprisonment were wiped out by the committal, and how the justices could think that the defendant ought to be punished for non-payment of arrears accruing while he was in prison it is hard to see, as there was no evidence of independent means. The Criminal Justice Administration Act 1914, Sec. 32 (3), now provides that arrears under a maintenance order shall not accrue while the defendant is in prison under a committal order unless the court otherwise directs, but otherwise the law remains as laid in Rex *v.* Richardson. The result is that justices, if they choose, can, by a succession of committals, imprison a man for life if he is without means.

As examples of the kind of things magistrates do, take the following cases in which there can be no possible dispute as to the facts, for they are taken from the reports of proceedings in the High Court.

In the case of Jones, A., *v.* Jones, D. L., heard on the 17th October, 1929 (see *English and Empire Digest*, Vol. 27, p. 44), the Kingston (Surrey) Borough Justices on 12th June, 1929, made an order for payment of £1 a week maintenance. On appeal Lord Merrivale said that an order for 10s. a week was as much as was warranted by the facts, and reduced the magistrates' order accordingly. In the meantime, however, the husband had been sent to Brixton Prison for two months. It should be noted that in this case the order was made on 12th June, 1929, but by 17th October in the same year the husband had already served two months' imprisonment for non-payment of arrears due under an order which the High Court considered was twice as great as it should have been.

The next is the case of Jones, B., *v.* Jones, M. E., also heard on 17th October, 1929 (see *English and Empire Digest*, Vol. 27, p. 43). Here the Swansea Borough Justices improperly made an order for payment of £1 a week on the ground of "neglect to maintain", although it was proved there was no wilful neglect and that the wife had in fact deserted her husband. They actually made this order without giving the husband and his witnesses an opportunity of giving evidence, although they had gone to the court for the purpose of doing so. Apparently the common, but irregular and objectionable, course of questioning him in the body of the court, not upon oath, or as a witness, was adopted. Lord Merrivale, in setting the order aside, said:

"The summons did not contain a lawful cause of complaint, the word 'wilful' being omitted. She proved that she would not return to her husband, and had come on the poor law. The natural conclusion was obvious. The summons was a nullity. The wife had proved that there was no such neglect to maintain, as it had been previously held at Lambeth that he had not deserted her. Without calling upon

the husband the justices proceeded to make their order. The justices added to their order an order giving the legal custody of an adopted son, a boy of fifteen, though he was in fact earning his living in London, to the wife. The law has borne hard upon the hospital porter in calling upon him to answer unfounded charges, and then finding him guilty of something that was no offence, and subjecting him to expense and the risk of imprisonment." His Lordship not unnaturally added, "It is a pitiful business."

In another case, Wall *v.* Wall, in 1930 (see *English and Empire Digest*, Supplement No. 8 to Vol. 27, p. 45), a wife took out five consecutive summonses in the same court against her husband for desertion. The first four were dismissed, but on the fifth an order for £1 a week was made, although it was shown that no new facts were disclosed. Apparently the justices followed the precedent of the importunate widow, but on appeal the order was discharged on the ground of *res judicata.*

But these instances are typical of what is happening every day before the magistrates. They are exceptional only in the fact that it was found possible to appeal and get matters set right by the High Court, not, however, in the first case, before the husband had undergone imprisonment.

The High Court itself does not always make matters clear as to these matrimonial questions. Take the cases of Millichamp *v.* Millichamp, decided in 1931, and Jackson *v.* Jackson, decided in 1932 (see *English and Empire Digest*, Supplement 8 to Vol. 27, p. 43). So that the reader may fully appreciate the valuable guidance which they afford it is necessary to quote the headnotes in full.

"An engaged couple agreed that after marriage they should live with the husband's mother at her house. After the marriage differences arose between

the wife and her mother-in-law which resulted in the wife's leaving the husband. The wife summoned the husband for wilful neglect to provide her with reasonable maintenance. The husband offered to take her back to the mother's house, and said that it was the only home which he could afford to provide. The justices made a maintenance order for £1 a week for wife and child. The husband appealed. Held: The justices were right. The husband's first duty was to provide his wife with a home according to his circumstances. The justices were right in holding that, by reason of the difficulty about the husband's mother, he had failed in that duty by putting his mother first. In view of his small earnings the wife's allowance was reduced from 15s. to 12s. a week. Otherwise the appeal failed."

Thus the voice of the High Court in Millichamp *v.* Millichamp in 1931. But study the facts and the decision in Jackson *v.* Jackson, heard in 1932.

"On a summons by the wife on the ground of wilful neglect to provide reasonable maintenance, it was found by the magistrates that the action of the husband in requiring his wife to live in a house next door to his mother, and in keeping control of the purse, and of the housekeeping with the assistance of his mother, constituted unbearable conditions for her. She had left the house with the infant child of the marriage after an altercation. The magistrates made an order against the husband for the payment of 30s. a week. The husband appealed. Held: The wife had not made out her complaint and the order must be discharged."

The lay justices may find it difficult to see how the principle laid down in the first case was applied in the second, and the main result in all these cases is that the magistrates assume, for practical purposes correctly, that the law allows them to deal with matrimonial cases just as they please, and that even

if they do make an attempt to understand the law they are likely to be wrong.

The result of the present state of the law and its administration is that, according to an article by Lord Snell in the *Week-end Review* for 16th September, 1933, " it is probable that nearly two million married people are living apart ". It must always be remembered that these people are merely separated, they are not free to marry again. Being ordinary human beings, most of them form sexual relations of one kind or another. This often results in extreme hardship. Everyone must have read reports of coroners' inquests on one or both of the victims of " death pacts ", in a large proportion of which a man or woman separated from his or her legal partner is concerned. In three instances during the last few months in my own practice I have been concerned in cases where bigamy has been committed as a direct result of separation without divorce. The better a man or woman is, the more likely it is that some permanent but illicit connection will be formed which prevents divorce being granted even in the few instances where it would otherwise be possible. I have known a case where a respectable hard-working man had a separation order made against him. I was not then concerned, so cannot say who was at fault. For a good many years he lived with the daughter of a highly respectable shopkeeper in a town a few miles from where his wife lived. None of his neighbours knew that he was not married. Twice he induced his wife to make the preliminary application for a " Poor Persons " divorce, and on one occasion he actually gave her the £5 for the necessary deposit, but the matter went no further. Not long ago he discovered accidentally that his wife was, and had been for years, living with another man, and drawing her separation allowance regularly at the same time. The necessary steps were taken, and the separation order was discharged. The present position

is that neither party can obtain a divorce. I could give many more instances of this kind of thing, but they might perhaps be identified.

It is often asserted that juvenile delinquency is largely due to "broken homes". I do not think there is much in this. The true connection between broken homes and juvenile delinquency is that the type of man or woman who breaks up the home is more than commonly likely to be the parent of a juvenile delinquent. Both troubles are due to a similar cause, and one does not result from the other. A fertile source of the broken home, however, is the forced marriage. In a large proportion of cases which have come within my professional experience the marriage has taken place "to give the child a name", which usually really means to avoid affiliation proceedings or an action for breach of promise.

A further result of our present system is that on an average for the last two years there are over 4000 actual committals for non-payment of maintenance arrears. The number has largely increased since pre-war days, while County Court committals for ordinary debts have decreased. In 1931, the last year for which statistics are, at the time of writing, available, the number was 4089 (see *Report of the Commissioners of Prisons for* 1931, published 1933, p. 94). This, of course, takes no account of the number of cases where committal orders are made and payment is made by the help of friends, nor does there appear to be any record of the amount of arrears which are not paid. This must amount to an immense sum. It is common in the courts to see men owing over £100 brought up on warrants. In one of the cases before mentioned the man was over £500 in arrear. On 10th October, 1933, a labourer, forty-five years of age, was sent to prison for three months for non-payment of £499 18s. —maintenance arrears due to his wife, under an order made on the ground of desertion. The concluding

paragraphs of the report in the *Birmingham Mail* of 10th October, 1933, are significant.

"P—— now denied that he had ever deserted his wife.

The Clerk: But you have paid under the order and been sent to prison under it.—Yes. I have been punished unmercifully for nothing.

Questioned as to his means, he said his income was £2 12s. a week, the 12s. being his pension.

The Chairman: What do you propose to do now?

P——: Nothing."

The expense of keeping men in prison and the possibly heavier expense of maintaining wives and children who are left chargeable to the rates is largely due to the practice of the magistrates in making orders beyond the man's means to pay. A further reason is that orders are often wrongly made, or, what is equally resented, are made without the man having a fair chance to put forward his side of the case.

One of the worst features of the whole business is that for practical purposes there is no appeal from the decision of the magistrates. Theoretically there is an appeal to the Probate Divorce and Admiralty Division of the High Court of Justice. As Stone's *Justices Manual* remarks: "The practice regulating appeals is governed mainly by the Rules of the Supreme Court, Order 59, rules 4d, 7, 8, 10, 11, 12 and 16." Notice of motion must be served on every party affected by the appeal and on the clerk to the justices, and the appeal entered, within twenty-one days of the making of the order appealed against. The Notice must state the grounds of the appeal, and it is entered by filing a copy of the notice at the Divorce Registry in London. At the same time as the notice is filed a duplicate copy of it, with two copies of the order appealed against and of the summons, and of the magistrates' clerk's notes of the evidence and of the reasons of the magistrates for their decision, have to

be left at the Divorce Registry for the use of the Judges on the hearing of the appeal. These notes have to be paid for, even by a " Poor Person ". The Notice is what is called an eight-day notice, that is, it must be served eight days at least before the day named in it for the hearing of the summons. In actual fact, of course, the appeal is never heard on the day named, but anything up to three months or even more later.

It is obvious that without legal assistance an appeal is impossible. It is also obvious that persons against whom maintenance and separation orders are made in the " Police Courts " seldom or never have the means to pay the cost of an appeal. It is difficult to get anything but a clear and simple case passed for a " Poor Persons " certificate, and even when the would-be appellant is in other respects qualified legal assistance is almost always necessary in order that a case may be admitted, and a cash deposit of anything up to £5 is usually required.

Assuming, however, that all other difficulties are surmounted, an appellant is under heavy disadvantage. It is the duty of the clerk to the justices to make a complete note of the evidence and of the decision arrived at and the grounds for that decision. This is a duty which, though repeatedly laid down by the High Court, magistrates' clerks are frequently reluctant to fulfil. The Court, however, will almost always refuse to allow the clerk's notes to be supplemented. The following were the facts of Wenham *v.* Wenham (*English and Empire Digest*, Vol. 27, p. 563). On 9th April, 1906, the Eastbourne magistrates made a separation order against a husband and ordered him to pay his wife 30s. a week. The husband appealed. The magistrates' clerk's notes contained a fairly complete note of the evidence taken on behalf of the wife, but the only note of the evidence on behalf of the defence supplied to the Court was as follows :

"The following witnesses were called for the defence, but only an incomplete note was taken of their evidence: John Thomas Wenham (defendant); Mabel Wenham, Hilda Wenham (defendant's daughters)." It was attempted to supplement the note by affidavits and a copy of a local newspaper. The Court refused to allow this to be done, and Mr. Justice Bucknill said:

"Here we have what seems to be a full note of the wife's evidence, and not a single word of the evidence of the husband. If this sort of thing is allowed to be done, and affidavits are then permitted to be filed, magistrates' clerks might take down as little of the evidence as they chose, and trust to newspaper reports being accepted by the Court. This court is of opinion that the cases which come before it must be presented in a proper legal form, and that magistrates' clerks must not take it upon themselves to omit any part of their proper duty. It is not for them to decide what they should take down and what they should omit. The whole of the case must be presented by them. We are quite satisfied that this case must go back to the justices and be reheard as the papers are not in order. The sooner that magistrates' clerks become aware that they must take a full note of all the evidence in these cases the better."

Mr. Justice Bargrave Deane concurred, and their Lordships then proceeded to set aside the order, remit the case to the justices, *and order the husband to pay the wife's costs of the appeal*, thus following the usual rule of allowing a wife in whose favour the justices have, however mistakenly, made an order, her costs of answering a husband's successful appeal. It was probably some consolation to the appellant that on the rehearing of the summons the Eastbourne justices dismissed the case upon the wife's own evidence!

The husband, as we have seen, is as a rule in the cheerful position of having to pay his wife's costs even

when he successfully appeals. And it has been held by the High Court that the fact that a husband who successfully appeals from an order of the justices has been admitted as a "Poor Person", and therefore pays no costs of his own, is no ground for departing from the usual practice of allowing the wife her costs of appearing in support of an order made by the magistrates (see Hope *v.* Hope (1915), *English and Empire Digest*, Vol. 27, p. 570). An even more difficult position for the husband was that created in the case of Sirrell *v.* Sirrell (*English and Empire Digest*, Vol. 27, p. 71), where, a husband having appealed from an order, an application for security for costs was made to a judge in chambers supported by an affidavit stating that he had no property to answer any order for costs and also stating that the wife had no means of her own. An order was made that the husband should pay into court or give security for the costs of his wife on the appeal, and the hearing of the appeal was stayed meanwhile. This seems to come fairly near "one law for the rich and another for the poor". The Divisional Court is not bound by findings of fact by the justices, but it will not reverse a finding of fact unless it be shown that the magistrates were clearly wrong in the conclusion at which they arrived. It will be remembered that the appeal is heard on the magistrates' clerk's notes, and, without unduly reflecting upon clerks, it is unlikely that these will be found to favour the appellant. One of the greatest difficulties of the "police-court" advocate is that he has no assurance whatever that a proper note is taken by the clerk, and, if a note of some sort is taken, its accuracy cannot be challenged before the Divisional Court. Almost all other appeals from the Courts of Summary Jurisdiction are to Quarter Sessions, where there is a re-hearing and the clerk's notes are of no importance except occasionally for purposes of cross-examination. It is apparently

not realised by High Court judges that justices' clerks are as a rule quite ordinary solicitors, usually in a hurry, and that the notes are frequently taken, not by the clerk himself, but by the clerk's clerk, without any supervision. High Court judges in fact know very little about what happens in the "Police Courts". It is true that one or two of them occasionally sit as Justices of the Peace, and, unless the courts which they honour by their presence are exceptional, probably cause some pretty strenuous window-dressing when they sit, but for the most part they have never seen a Court of Summary Jurisdiction since their early days at the bar, and then very seldom. Their amazing detachment from ordinary life is shown by the fuss they make about whether a non-cohabitation clause is or is not included in an order. It is unlikely that any party affected by an order has ever even known whether the clause was inserted or not unless the point has arisen in subsequent proceedings. Such a clause may be of vital importance to a wife in enabling her to avoid the results of the Russell *v.* Russell decision and to obtain an affiliation order, or to a husband in getting a discharge of the order on the ground that his wife has given birth to a child whose paternity he denies. Not long ago I was concerned in a case where a man, who had by means of Russell *v.* Russell got out of two previous attempts by married women to make him pay for children of whom he was undoubtedly the father, failed to escape the third time because there was a non-cohabitation clause in the order affecting the woman. This, however, is not the reason why the High Court get excited. Their fear is lest respect for the order may prevent the parties resuming cohabitation!

There is no single remedy for the present state of things. Reform of the Divorce Law, and giving Divorce jurisdiction to the County Courts, would do much. If this cannot be done, the magistrates should

be empowered to grant divorce, subject to a real, and not a sham, right of appeal. As already pointed out, the issues involved in divorce are constantly tried before the magistrates.

The question of imprisonment for non-payment of maintenance arrears is a difficult one. There are husbands who deliberately refuse to pay, although they have, or could get, the means to do so. For them punishment is appropriate. But, although I have met with such husbands fairly often in my own experience, as a rule the threat of imprisonment has not brought the money but they have gone to gaol. This doubtless satisfies one's anger, but costs the country money, and gets the wife nothing. Imprisonment is not, in my experience, much use as a deterrent, though it should be retained to prevent the law being brought into contempt. A more effective remedy would be the power to attach a proportion of a man's wages, with a provision that the justices should be entitled to assume that he was receiving the rate of wages usual in the trade and to compel the employer to pay over the amount ordered. This would prevent the common trick of working for a friend or relative at a specially arranged rate. The present state of things cannot be satisfactory for wives, although, as before noted, there does not appear to be any record of the total amount of maintenance arrears unpaid.

If magistrates were deprived of the power to imprison men for the non-payment of maintenance arrears without proof of means it would prevent injustice, save the country money, and improve the chances of wives getting paid. It should be made compulsory for the clerk or chairman to explain in simple language to every man against whom a maintenance order is made that he has the right to come to the court to have it varied should his circumstances change. At present this is seldom done, and yet more seldom understood.

A reasonable opportunity of appeal should be given. If matrimonial cases are left with the magistrates an appeal to the County Court would be the best plan. Appeals might be heard on the clerk's notes, as at present, but with power to have witnesses called to supplement the notes, at the judge's discretion. As the appeals would be heard locally this would not involve much expense. The point made by the Report of the Committee on Appeals from the justices that difficult points arise which need the attention of the High Court is met by the power which the Courts of Summary Jurisdiction already have under Sec. 10 of the Summary Jurisdiction (Married Women) Act 1895, to refuse to make an order if in their opinion the matters in question between the parties would be more conveniently dealt with by the High Court. If necessary, this section should be extended and made clearer, as there has been a good deal of doubt as to its exact legal effect, though it is submitted that its intention is obvious enough.

I have grave doubts as to whether the Courts of Domestic Relations, advocated by Lord Snell and others, would in practice work well. In the first place it would be difficult to get the right men and women to run them. It is true that, as a correspondent pointed out in the *Week-end Review* for 23rd September, 1933, there are a fair number of compulsorily retired Civil Servants with Colonial experience who would be suitable for the job, but they wouldn't get appointed, neither would there be enough of them. The people who would get appointed would be of the District Visitor type, like most of the old women of both sexes who are getting appointed to the Children's Courts. As things are, it is seldom that a matrimonial case comes to a hearing without efforts having been made towards a reconciliation, either by the solicitor or solicitors concerned, the Court Missioner, or some local clergyman, minister or priest.

I should prefer the proposal of Mr. Claud Mullins, set out in his book *Marriage, Children and God*, for an informal hearing of matrimonial cases before justices taken from a specially selected panel, the rules of evidence being very largely relaxed. Although there is much to be said for this scheme, I have grave doubts as to relaxing the rules of evidence. I have known many women, and some men, who would impose on anyone if given a chance, and in matters involving sexual relations, even though indirectly, most people are swayed by prejudice and irrational emotion. The trouble about experienced judges and magistrates is that they think they know a lot more than they really do. This is due to the fact that, although a great many cases come before them, it is comparatively seldom that they have the opportunity of checking the accuracy of their judgments. The solicitor is usually the only man who knows the truth. Not because of his superior insight, but because he usually has the chance of seeing for himself what the persons concerned have done and do, not only on the particular occasion, but before and after. I know a certain County Court judge, an exceptionally shrewd and able man, who has in my experience been wrong more often than not in estimating whether or not a man was a liar the first time he came before the court. On subsequent occasions, when he had an opportunity of cross-checking his earlier observations, he would usually find the man out. But of course these subsequent occasions seldom occur for a judge, even in the County Court, while for a solicitor they almost always do. I doubt whether there is any man or woman who cannot be taken in by a plausible tale told by the right person for the first time. Everyone has a weak spot for a particular type. It is this kind of "personal error" that the rules of evidence are designed to correct. Further, I regard with distrust proposals for doing away with publicity in connection

with matrimonial cases. There is quite enough perjury as it is.

I suggest that it is desirable that a wife should be able to obtain a divorce from her husband at any time after seven years of marriage if she genuinely wishes to do so, without any ground for divorce beyond her request. I do not expect that many people will agree with this view, but it is based upon an extensive experience of these cases. A woman who obtained a divorce under such circumstances should not, of course, be entitled to any maintenance, except for the children of whom she might be given the custody. It would not be fair to give a man a similar option, for a woman's chances of marriage and of obtaining employment seriously diminish after she is thirty. There are a large number of cases, especially among the working and lower middle classes, where a woman is in a hopeless position. The man is tired of her, neglects her, drinks or gambles or both, and gives her the least possible allowance for housekeeping, without letting her have any ground for applying to the court for an order. Take the case of a woman who consulted me on the day this was written. She was married ten years ago, when she was nineteen, there is one child, a girl, nine years old. The husband earns £4 10s. a week, of which he gives her £2 5s. to pay for everything. He is, so far as she knows, faithful and does not drink to excess, but he spends his money in betting, neglects her, and gets into debt everywhere. He has been helped, for her sake, by friends and relations repeatedly, but everyone's patience is exhausted. The wife says she hates to answer the door because it almost always means some demand for money or a summons. She has often spent a part of her allowance in paying small sums to stave off creditors. She could, if she left him, keep both herself and the child by her own work, but as a woman living apart from her husband, especially

without a separation order, she would be in a difficult position in many ways, and would be likely to lose any job. If she could obtain a divorce she would find it much easier to get work, and would probably marry again. As it is, a crash is inevitable, but in a few years' time the woman will be worn out and unable to do anything. This is not an exceptional case but a typical one.

The causes of the matrimonial discord which brings the parties to the court are to be found fully discussed in Mr. Claud Mullins' book *Marriage, Children and God*, to which I have already referred. I am in almost complete agreement with Mr. Mullins as to the causes, although I have approached the subject from a different angle. The law is not, however, much concerned with these causes, except in so far as the teaching of birth control at the clinics should be extended beyond the narrow limits at present laid down by the Ministry of Health. One point, however, may be mentioned. It is sometimes argued that sexual difficulties are not the principal cause of matrimonial trouble, the point put forward being the fact, well known to the police and social workers, that husbands and wives who are legally separated in many cases meet for occasional sexual intercourse, although on neither side is there any intention of reconciliation. This is, however, a very different thing from the incessant and excessive sexual demands to which Mr. Mullins refers, and no doubt it is often due to a relationship such as existed between Mr. Britling and one of his lady friends in Mr. H. G. Wells' novel *Mr. Britling sees it through.*

CHAPTER VII

HOUSEHOLD SERVANTS

THERE is no subject on which a solicitor is obliged to give free advice more often than in connection with household servants of one kind or another. One of the difficulties is that the average employer is unable to conceive of a servant as having any rights at all so long as he or she remains in employment. Contractual rights are admitted to exist before and after the employment, so far as remedies for breach are concerned, but while actually in service a servant is regarded as having a duty of unquestioning obedience fully equal to that demanded of a private soldier or a dog. It is true that servants are far better treated than they used to be. So are soldiers and dogs. But the mental attitude has not altered so much as is supposed from that which existed in Trollope's time, where, in order to show the depths of misery and degradation to which one of his characters had been driven by the imminence of a serious criminal charge against her, he says that she would almost have changed places with a servant. Most people who have reached even middle age will admit, if they are honest, that they can remember a time when it seemed to them that domestic servants belonged to a sub-human species, or at least were not of the same kind of flesh and blood as themselves. It is obvious that Thackeray realised what a sensational incident he was introducing when he made Morgan the valet rebel against Major Pendennis, and his relish in the ultimate triumph of the master over the man is painfully obvious.

The essential thing which determines that the relation of master and servant exists, and not that of principal and agent or employer and contractor, is that a servant is not only bound to do work, but to do it in the manner directed by the master. This right on the part of the employer to direct how the work is to be done is the essential point in the relation of master and servant. Although at present there is no difficulty with regard to the status of a household servant, it may not be so in the future. It is quite possible that in the near future the domestic work of a household may be done by contract with a person or persons who come for a stated time and carry out the work in their own way. In such cases it may be difficult to say whether or not the persons employed are servants, or independent contractors like the ordinary window-cleaner.

Another point which seldom arises at present is as to the period during which the servant is under the orders of the master. In the absence of specific agreement or statutory provision as to time, the law implies in every contract of hiring an undertaking by the servant to work at all reasonable hours when required. It is of incidental interest that in 1829 the High Court took judicial notice of the fact that in factories the ordinary hours of working were, generally speaking, twelve hours a day (see R. *v.* St. John, Devizes (Inhabitants), *English and Empire Digest*, Vol. 34, p. 33). In the same year there was a case in which a pauper was " hired for a year, at 4s. 6d. a week, to work from six in the morning till seven in the evening, and to make as much overwork as he chose ". It was held that there was an exception in the contract limiting the control of the master over the servant to thirteen hours a day, and that beyond that period the master had no right to compel work, nor was the servant under any obligation to perform it (see R. *v.* Birmingham (Inhabitants) (1829), *English and Empire Digest*,

Vol. 34, p. 33). For a household servant of any kind the question of reasonable hours would be a question of fact. Probably the tendency at present would be to hold as unreasonable requirements that would have been taken as a matter of course a generation or two ago, when Cato's theory that a slave should be working at all times when he was not sleeping was often thought to be applicable to domestic servants.

The expressions household, domestic, and menial servant all have the same meaning. The word menial has come in modern times to have a derogatory sense. Its origin is doubtful. Blackstone, in his *Commentaries*, and Lord Abinger in 1835, referred its derivation to the fact that such servants lived intra moenia. Mr. Justice Roche, however, in 1922, in the case of re Junior Carlton Club (see *English and Empire Digest*, Vol. 34, p. 37), adopted the view of Mr. Justice Collins, expressed in an earlier case, that " it is from the Saxon word meiny or mesnie, which signifies a household or family ". In the same case his Lordship said, " domestic servants are servants whose main or general function is to be about their employers' persons, or establishments, residential or quasi-residential, for the purpose of ministering to their employers' needs or wants, or to the needs or wants of those who are members of such establishments, or of those resorting to such establishments including guests ".

A governess is not a menial servant, although in 1852 it seems to have been thought worth while to contend that she was. She is apparently entitled to three months' notice in the absence of express agreement on the point. A contract of service for a year or less may be made by word of mouth, but if for a longer period must be in writing to be legally binding. Contracts for personal service are not specifically enforceable, but merely give rise to a claim for damages should they be broken. In theory the ordinary contract with a domestic servant is for a year's service,

terminable by a month's notice or payment of a month's wages.

A servant is entitled to wages during absence through temporary illness, provided that the contract of service remains in force during the illness, and that the servant is, apart from the temporary incapacity, willing to work.

An employer is entitled to terminate the employment of a domestic servant by giving a month's notice, or paying a month's wages. This notice may be given at any time, and not only at the time when a month ends and wages are paid. In addition to the month's wages in lieu of notice, the wages accrued up to the date of the servant's leaving must be paid. By express agreement between the parties other terms as to notice may be arranged, but such a contract would have to be proved by strong evidence. A servant who gets a month's money in lieu of notice is not entitled to board wages, i.e. the equivalent of his or her keep for that period, in addition. There is an exception, however, in the case of a servant who is wrongfully dismissed during the currency of a month's notice given by the servant. In such a case the servant is entitled to recover compensation for the loss of board and lodging for the unexpired period of the notice (see Lindsay *v.* Queen's Hotel, *English and Empire Digest*, Vol. 34, p. 104).

It appears to be now established that there is a custom of which the courts will take judicial notice, that the service may be terminated at the end of the first month by notice given at or before the expiration of the first fortnight. This seems to be settled by the case of George *v.* Davies (see *English and Empire Digest*, Vol. 34, p. 66). It was held in 1898 that the custom must be proved in each particular case, but by 1911, the date of George *v.* Davies, the custom was sufficiently well known for its proof to be dispensed with. Strictly speaking, no notice on either side

would appear to be necessary to terminate the service of a domestic servant at the end of a year of service.

Apart from giving a month's notice or paying a month's wages there are several ways in which a servant's employment may be determined, the most obvious of which is the death of either master or servant. Wilful disobedience to a lawful and reasonable order will justify summary dismissal without notice or wages in lieu of notice. In the case of Turner *v.* Mason (see *English and Empire Digest*, Vol. 34, p. 69) a domestic servant asked leave to visit her mother who had been taken suddenly and dangerously ill and had asked her daughter to see her before her death. The leave asked was for a visit during the night, which would not apparently have interfered with the servant's duties, but it was refused. The servant nevertheless went against orders, and was held to have been lawfully dismissed for wilful disobedience. This case was decided in 1845, but in principle is still law. Disobedience to an order requiring something to be done outside the scope of the employment or which involves danger to life or limb is, however, justifiable.

Another ground for dismissal without notice is misconduct. It is not easy to say what misconduct will justify summary dismissal, but it must either have some relation to the service or be so serious that it would be unreasonable to expect the employer to continue the employment.

It was held in a case decided in 1777 that " a maid-servant " may be discharged if found to be pregnant. Whether this would apply in the case of a married woman is doubtful, and would probably depend on the facts of the particular case. This right to discharge without notice on pregnancy has been acted upon so long that it must be presumed to be the law, but it frequently gives rise to cruel hardship, and appears to be without sufficient legal justification. I have known

a case in which a minister of religion, I will not mention his denomination, turned out a pregnant girl although he knew that she was without money and friends and had nowhere to go. An employer has no right to have a female servant medically examined to ascertain whether she is pregnant, if she objects. It is often said that a male servant who has become the father of an illegitimate child during his service may be summarily dismissed, but there does not appear to be any authority for this and it is probably not the law. There was a case in 1778 where the summary dismissal of a male servant who was the father of the bastard child of a servant girl in the master's employment was held to be justified, but this is clearly distinguishable (see R. *v.* Welford, *English and Empire Digest*, Vol. 34, p. 77). With regard to the nature of the misconduct outside the service it can only be said that to justify summary dismissal it must be such as to render it unreasonable for the employment to be continued, as for instance if the servant were to be convicted of theft or some other offence involving dishonesty. Whether misconduct or disobedience justifies summary dismissal is mainly a question of fact for the jury.

A servant who is grossly insulting or abusive may be summarily dismissed, or if he or she is habitually neglectful of duty. The insolence or abuse must, however, be serious or repeated. As Chief Justice Cockburn once said in dealing with a case where wrongful dismissal was alleged, " Rudeness is an uncertain term, and persons may differ as to what is rudeness." An employer may determine the service without notice in case of illness causing serious and permanent incapacity, but not in the case of temporary illness. Wages, however, have to be paid up to the time the employment is determined.

When a servant is properly dismissed without notice only the wages actually accrued due need be paid and

not a proportion of those to become due at the next day of payment. The same rule applies when a servant leaves without notice, but in this case subject to a counter-claim by the employer for a month's wages by way of damages. If an employer knows of and passes over an offence it cannot subsequently be used as a ground of dismissal, but facts of which a master becomes aware after the dismissal may be used by way of justification although they were not known at the time of the dismissal, and other grounds were alleged for it.

A servant is entitled to leave without notice on several grounds. If there is reasonable apprehension of danger to life, for instance, the servant is entitled to go. A judge in 1845 gave as an example of this "where from an infectious disorder raging in the house she must go out for the preservation of her life". This was in the days of cholera and virulent smallpox, and it is doubtful whether the example is a good one at the present time, or rather whether it is likely that it would be held to be necessary to go for the preservation of life. Assault, ill-treatment, or indecent familiarity on the part of a master towards a female servant would justify leaving without notice. Probably if a mistress were to take up the attitude of Potiphar's wife towards a man-servant he would be entitled to go at once. Non-payment of wages due or failure to provide food would be a breach of the contract by the master which would justify a servant in leaving. A master is bound to provide food and lodging for a domestic servant unless otherwise agreed. A servant who finds that he or she is employed in an illegal manner, for instance in carrying on the business of a gaming-house or a brothel, can, and of course should, leave at once.

It was decided in the case of Sellen *v.* Norman in 1829 (see *English and Empire Digest*, Vol. 34, p. 115) that a master is not bound to provide a domestic

servant with medical attendance and medicines during illness. This followed various conflicting decisions on the point, and is still law, though it has been held in Scotland, and is probably the law here, that it may in certain circumstances be the master's duty to call in the servant's panel doctor. Should the master call in his own doctor to attend a servant who is ill, the cost of such medical attendance cannot be deducted from the servant's wages.

An employer is not bound to give a servant a " character ", not to answer inquiries made by persons to whom a servant has applied for a situation. Should any statement be made as to a servant's character, it must, however, be true to the best of the master's belief. Even if untrue it is what is called privileged if made to persons interested in ascertaining the servant's character, and the employer is not liable to an action for damages unless the statement was made maliciously. The fact that the statement was known to be untrue would, for instance, be evidence of malice. It is often alleged to be a hardship upon a servant that a " character " can be refused, but it would be a greater hardship upon an employer to be obliged to furnish one, at the risk not only of being sued by the servant for defamation should it be possible to show malice, but also of an action being brought by the person to whom the character was given should such person suffer damage by reason of false statements made therein.

It is not generally known that it is a criminal offence under the Servants Character Act 1792 for an employer to give a false character as to the period of time during which a servant has been in the employer's service, whether the statement is made verbally or in writing, under a maximum penalty of £20, or the appropriate term of imprisonment on non-payment. Under the same Act a servant is liable to a similar penalty for making a false statement as to length or place of

service, or using a false or forged character, or for altering a character given by a former master. Occasional prosecutions under this Act still take place.

The cost of accidental breakages cannot legally be deducted from wages unless this is expressly agreed. Should there be actual negligence on the part of the servant, it would be possible to counter-claim for damages for negligence in the event of a claim for wages. The magistrates in what is called the " police court " have no jurisdiction in disputes between masters and domestic servants as such, and claims must be dealt with in the County Court or the High Court if necessary. Incidentally, there is no right for an employer to search a servant's boxes or to detain his or her property.

Speaking from personal experience, which is of course limited, I find that the objection on the part of average working-class parents to domestic service for their daughters is due to fears for the girls' moral character. There are several reasons for this. Although factory life is often supposed to corrupt girls, the average factory worker knows the risks she may run, she lives at home and her parents know what time she comes in and her numerous friends and acquaintances usually see that everyone is kept well informed as to her movements. A large proportion of female domestic servants go to houses where they are thrown in close and continual contact with their male employers and the sons of the house, and they are in an extremely helpless position. A position, moreover, to a large extent corresponding with Mr. G. B. Shaw's remark as to marriage in that it combines the maximum of temptation with the maximum of opportunity. In the present state of male morality girls in service are too often regarded as fair game. During their " evenings out " they are usually far away from their home and friends, for no one likes to engage a girl who is near her own home, and they are often picked up by

undesirable characters. I understand that the ranks of prostitutes are largely recruited from domestic servants. *Pamela* was written nearly two hundred years ago, but manners change slowly.

In this connection I may refer to another matter. Many men know the type of smoking-room story which turns on the master of the house finding a female servant in some sort of voluntary deshabille. I have on several occasions been consulted by men, some of them of irreproachable moral character, who have met with difficulty of this kind. It is hard to know how best to advise them, for everything depends on the circumstances of the particular case. Often the best course is to go to a local police officer of not less rank than inspector and tell him the full facts as man to man, not as making a complaint. The police have a surprising amount of information as to the habits and customs of everyone in their district, and with few exceptions, their eyes and ears are open and their mouths shut. I have mentioned this matter because it may be of interest, and perhaps of use, to those who have undergone a similar experience to know that it is not a very uncommon one.

I hope nothing I have said will be construed as a suggestion that domestic servants as a class are immoral. They are not, but I am afraid it is true that they are exposed to more temptation than in most other occupations. I understand that for a man holding authority of any kind to use his position to enable him to have sexual relations with any female engaged in his department is an exceedingly serious offence under the penal code of Russia. Such a law would be useful in this country, with strict provisions as to corroboration to avoid blackmail, and its operation would be very far from being confined to domestic servants. The experience of Frieda as a stenographer, referred to in *Magnus Merriman*, was not unique.

Probably everyone knows that domestic servants

come within the Workmen's Compensation Acts, and all but the most careless insure against liability for accident. It may possibly be worth while pointing out that the course of service of a resident domestic servant is, for the purposes of the Acts, practically continuous during the whole time he or she is employed, except when away on business of their own.

CHAPTER VIII

DOCTORS

It is difficult to write fairly about the medical profession. A writer in the *Week-end Review*, in the course of an attack on doctors, quotes the saying of a character in one of Mr. John Buchan's stories: "When a thing pits the fear of death on a man he aye speaks well on it." There is much truth in this. There is a striking difference between the way in which lawyers and doctors are spoken of in public and in private. Publicly doctors are praised and lawyers are reviled. In private conversation the opposite is apt to be the case. The immense advances made by medicine and surgery in the nineteenth century, although in fact largely due to the long-deferred teaching of elementary cleanliness, were accompanied by a childlike faith among the general public that whatever the doctors said must be right. "Science" was infallible, and the doctor was supposed to be a man of science. Vaccination was in Victorian times considered to be both an undeniable safeguard and absolutely harmless. When I was a boy an anti-vaccinationist was looked upon very much as a flat earth man is. Now it is officially recognised that vaccination is often the cause of sleepy sickness (*encephalitis lethargica*), a disease almost as horrible as syphilis in its effects. It was only a generation or so ago that an eminent medical man, to prove the impossibility of syphilitic infection resulting from vaccination, was himself vaccinated with lymph taken from a patient suffering from syphilis, with the result that he died from that disease.

The distinction between physicians and surgeons is an old one. Halsbury's *Laws of England* states that, " broadly speaking, it may be said that a physician is one who treats patients for disease and internal ailments ". In 1828, Lord Chief Justice Best said:

" The business of a surgeon is, properly speaking, with external ailments and injuries of the limbs " (see Allison *v.* Haydon (1828), *English and Empire Digest*, Vol. 34, p. 542).

These legal distinctions are, like many other things connected with the law, obsolete. It has been said, with truth, that a physician deals with the patient and a surgeon with the disease. I have heard an experienced general practitioner say that any good plumber could be taught to be a surgeon in six months. The distinction is now only of importance as regards the class of work usually undertaken by a practitioner. Legally, every registered medical practitioner is obliged to qualify both as a physician and a surgeon.

The Charter of the Royal College of Physicians is dated 23rd September, 1518, but that of the Royal College of Surgeons is as recent as 1843. The Royal College of Surgeons was, however, founded in succession to very much older bodies, the Company of Barbers and Surgeons, which was dissolved into separate associations in 1744, being a very ancient combination.

The General Medical Council rules over the medical profession so far as registered medical practitioners are concerned.

The General Medical Council is best known to the lay public in connection with the process of striking off the register. If a registered medical practitioner is convicted of a felony or misdeameanour—in effect, what is commonly called a crime—or of what is called " infamous conduct in any professional respect ", the General Medical Council may, if they think fit, direct his name to be erased from the Medical Register.

The procedure in connection with the inquiry which is held before a practitioner's name is struck off the register appears to be reasonable enough, and the practitioner has a fair opportunity of putting forward his case, but the tribunal is heavily weighted in favour of orthodox medical opinion. The lay public is not represented, and all the members of the Council are practically certain to be both highly respectable in the colloquial sense, and at least of middle age.

Being struck off for crime needs no comment, but " infamous conduct in a professional respect " requires explanation. Lord Esher said, in the case of Allison *v.* General Council of Medical Education, etc. (*English and Empire Digest*, Vol. 34, p. 544): " The question is not merely whether what a medical man has done would be an infamous thing for anybody else to do, but whether it is infamous for a medical man to do it. An act done by a medical man may be infamous though it would not be infamous if done by anybody else."

It is interesting to note what Lord Justice Lopes in 1894 held to be evidence proving infamous conduct in a professional respect. (I quote from the Law Times Report.)

" But there is another matter to which the Master of the Rolls has not alluded, viz. the plaintiff's conduct with regard to his pamphlet on vaccination. His conduct in that matter appears to me to come distinctly within the definition I have given. In 1887 or 1888 he published a pamphlet against vaccination which met with great disapproval, and he promised to withdraw it, and so far as he was concerned, it appears that he did withdraw it from circulation. But it had passed from his hands into that of the Anti-Vaccination Society, and well knowing that, he advised his patients to consult that society, being perfectly aware that the advice that they would get from the society would be to adopt a method of effacing the effects of vaccination.

In fact, he was indirectly advising those who consulted him to violate the law which the Legislature has thought desirable for enforcing vaccination. On both these grounds I think there was ample evidence to justify the council in coming to the conclusion that the plaintiff was guilty of 'infamous conduct in a professional respect'."

I have myself been four times vaccinated, and I am not an anti-vaccinationist, but I wish Lord Justice Lopes could have lived to read the views recently expressed by leaders of the medical profession on compulsory vaccination.

The instance of "infamous conduct" best known to the general public is of course that in which Dr. Axham was struck off the register for working in conjunction with Mr. (afterwards Sir) Herbert Barker, the famous "manipulative surgeon" or "bone-setter". This case will always be a blot on the reputation of the medical profession. Anyone who speaks to a medical student or practitioner about the successes of bonesetters will almost certainly be told the story of the man whose knee was treated by a bone-setter, and who ultimately died from the results of the bonesetter's dealings with an unsuspectedly tubercular knee. I have heard this story many times during the last twenty years, sometimes, it is true, with the variation of a cancerous knee. It always infuriates the teller of the tale if one points out that such a contingency was precisely what Dr. Axham was employed to prevent, and that the medical profession did their best, or worst, to stop him from so doing. Apart from this one would suppose from the way doctors sometimes talk that mistakes in diagnosis were never made by registered medical practitioners, instead of being, as they are, appallingly common.

A medical man struck off the register is not, as is often supposed, disqualified from practising.

Registered medical practitioners are excused from

service on juries and in various offices and in the militia, and they alone may sign certificates required by law to be given by a medical practitioner. This inability to grant certificates is a very serious handicap to an unregistered practitioner. A medical practitioner attending a patient suffering from certain infectious diseases is required to notify the case to the Medical Officer of Health of the district, and incidentally gets a fee of 2s. 6d. for doing so. He must also give a certificate as to the cause of the death of any person whom he has attended during the last illness, and in certain cases, on default by the proper persons, he must give information as to births at which he has been present. A medical practitioner, unless registered, is not eligible for appointment as such in the Navy, Army, on ships, in asylums, gaols or public institutions of any kind, to friendly societies, or in hospitals not wholly supported by voluntary contributions, nor may he be appointed as a Medical Officer of Health. Only registered medical practitioners may perform vaccination.

The practice of medicine and surgery by unqualified persons is not illegal, but any person who wilfully and falsely pretends to be qualified is liable upon summary conviction to a penalty of not exceeding £20. How far the question of the false pretence is one of fact or of law is doubtful. An osteopath, who was not a legally qualified medical practitioner, was convicted for affixing outside his house a plate on which he was described as " Bonesetter, Osteopathic Physician and Surgeon " (see Whitwell *v.* Shakesbey (1932), *English and Empire Digest*, Supplement No. 8 to Vol. 34, p. 92). So long ago as 1654 the question as to whether practising as a physician without a licence was an indictable offence came before the courts.

There is a widespread but mistaken belief that a " doctor " cannot sue in the courts for his fees. This was formerly the case with regard to physicians, for

a physician's fee was regarded as an honorarium, like that of a barrister. A surgeon could always sue, and there used to be some subtle arguments before the courts as to whether the work done was surgical or not. Now, however, all registered medical practitioners can sue for their fees, unless they are Fellows of the Royal College of Physicians. These exalted gentlemen may neither sue for their fees, nor be engaged in trade, nor dispense medicines, nor practise in partnership, nor sell a practice. An unregistered medical practitioner may charge fees, but cannot sue for them in the absence of express agreement. It should be remembered that this applies only to medical treatment. It has been held that the Medical Act 1858 does not apply to an osteopath, so as to prevent him from recovering at law fees charged for treatment as distinct from diagnosis or advice (see Macnaghten *v.* Douglas (1927), *English and Empire Digest*, Supplement No. 8 to Vol. 34, p. 92). In a Canadian case it was held that a man who neither prescribed, gave advice, nor administered medicine, and whose treatment consisted solely of sitting still and fixing his eyes on the patient, was not practising medicine. This decision would appear to convey an implied criticism of Sir Luke Fildes' picture "The Doctor".

With regard to the amount a doctor can charge, the law is thus stated in Halsbury's *Laws of England* (Vol. 20, p. 336):

"Where the fees are not arranged beforehand, the practitioner is entitled to what a jury think reasonable, having regard to his eminence and the distance which he had to travel."

This, in effect, leaves the medical profession free to charge very much what they please. The extent of what, if they were lawyers, would be called their extortions, is limited only by competition among themselves. In country districts where there is little or no competition astounding charges are sometimes

made. It is usual for a doctor's fee for a visit to bear some relation to the rent of the patient's house, or the amount of his income, but the number of visits rests with the doctor, and it is he who estimates the income. Consulting physicians and operating surgeons get their fees in advance, and charge what they please. In the course of my professional experience I have come across many instances of exceedingly heavy charges by doctors, bills which certainly seemed as if they would have been heavily reduced on taxation had any procedure similar to that under which solicitors' bills are taxed been available. I have of course met with as many or more instances in which doctors have made moderate or no charges to people without means, whom they have attended, knowing that payment was improbable. I mention this in fairness to the medical profession. It has no bearing on the general question as to whether there should not be some check on doctors' bills. To defend an action brought by a medical practitioner to recover his fees is generally useless. It is practically impossible to get any doctor to give evidence for the defence that the charges are unreasonable, and in the absence of a standard a judge and jury can only act on the evidence before them.

There does not seem to be any good reason why doctors' bills should not be taxed, if required by the patient, in a manner similar to that in which a solicitor's bill can be taxed. There is, in legal matters, either a definite scale of charges, item by item, or else a fixed maximum for the entire transaction. The ground on which taxation of their bills is imposed on solicitors is that they have statutory privileges, that unqualified persons are not allowed to compete with them, and that it is very difficult for the layman to tell whether or not their charges are proper. All these reasons apply with even greater force to the bills of the medical profession, with the addition that they are

dealing with persons who are in most instances not in a normal state, owing to illness, grief, or distress.

I suggest that Commissioners should be appointed in every district before whom doctors' bills could be reviewed in a manner similar to that in which solicitors' bills are taxed. I believe that suitable men could be found to act as Commissioners. To suggest that it would be impossible to find the right men is to cast a serious slur on the medical profession. Already complaints against panel doctors are constantly made and dealt with. No novel principle is involved in the setting up of some such tribunal as I suggest for dealing with doctors' bills.

It is difficult to see what valid objection can be made by the medical profession. In some quarters there would no doubt be the usual cry as to the amount of work that medical practitioners do free of charge. If the inference to be drawn is that they have to overcharge the rest of the community to balance this, then they do not in truth do their work free of charge. And Coroners' Inquests often disclose the refusal of doctors to attend patients without payment. But in any event the legal profession also do an immense amount of work for nothing, under the Poor Persons' Rules, in addition to what is done privately by individual practitioners, but no one has ever suggested this as a reason why lawyers' bills of costs should not be taxed. Solicitors do not even get advertisement or experience in acting for Poor Persons as the medical profession do in full measure for their work in the hospitals. Taxation of doctors' bills might even do something to prevent unnecessary operations, but Mr. G. B. Shaw has dealt very fully with this matter in the Preface to *The Doctor's Dilemma*. In this connection it may be mentioned that the rulers of the medical profession have thought it necessary to issue a warning that

proved cases of sharing fees with operating surgeons will be dealt with severely.

Another respect in which the law needs amendment is with regard to professional secrecy. A medical practitioner who is called as a witness in the courts is bound, in answer to questions properly put, to disclose confidential communications and information which have been given to him in his professional capacity by patients. I have often met doctors who have declared that they would go to prison before they would answer such questions. I have not, however, heard of any doctor, who, when actually put to the test, has in the end refused to answer, although there have been several cases where doctors have at first objected. Mr. Justice Avory has even gone so far as to say that it is the duty of a medical man, who is informed by a patient that a crime has been committed, to communicate with the police, and disregard the confidential relationship between doctor and patient. It will probably appear to the majority of people that absolute confidence in the professional secrecy of medical practitioners is of more importance to the community than the obtaining of evidence in divorce cases or the occasional detection of a crime. In particular, it is of vital importance for the early treatment of venereal diseases that there should be absolute privilege as to matters learned by medical practitioners from patients. The standard of professional secrecy with regard to hospital patients is regrettably low. I have known information obtained by medical practitioners attending a hospital used against the patient in subsequent proceedings under the Workmen's Compensation Acts, and in accident cases. In these days when many of the eminent specialists who attend hospitals are constantly retained by various insurance companies, this is a serious matter, and shakes confidence in the hospitals among the working classes.

The liability of a doctor for negligence so far as the law is concerned, is similar to that of the members of other professions. The position is clearly stated in the headnote to the case of Lamphier *v.* Phipos, decided in 1838 (see *English and Empire Digest*, Vol. 34, p. 548):

"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill; he does not, if he is an attorney, undertake at all events to gain the cause; nor does a surgeon undertake that he will perform a cure; nor does the latter undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes to bring in a fair, reasonable, and competent degree of skill; and in an action against him by a patient, the question for the jury is, whether the injury complained of must be referred to the want of a proper degree of skill and care in the defendant, or not."

The patient is the only person who has a right of action against a medical practitioner for negligence, except in the case of death resulting, when an action for damages may be brought in respect of the pecuniary loss sustained by the wife, husband, parent or child of the deceased. But to have a right of action and to succeed in an action are two very different things. It is difficult, as a rule, to say that any sort of treatment is negligent. Medicine is far from an exact science. And it is rare to find a medical practitioner who is willing to give evidence against one of his professional brethren. Just as in the case of a coroner's inquest doctor after doctor comes forward to swear that everything possible was done for the deceased, so, but with even greater unanimity, do they rally to the aid of the practitioner who is the defendant in a negligence action. Lest I should be suspected of prejudice I quote the following in-

stance from an article by a doctor in the *Week-end Review* for 9th September, 1933, describing what happened after a young mother had died:

"I have not space to describe the macabre humours of the inquest that automatically followed. The Coroner was a governor of my hospital; and it was conclusively shown that 'all that science could suggest and skill perform had been done for this unfortunate woman, who had paid the penalty, which, for inscrutable reasons, Providence imposes with seeming fortuity as a condition of earth's replenishment'. Far truer, I knew, was the unofficial verdict which I heard as I hurried past the group of relatives outside the court: 'Nothing more nor less than murder; that's what I call it'."

Within my professional experience during the last few years I have met with an instance of the death of a woman through exactly the same cause as that mentioned in the article from which I have quoted. There was not even an inquest, for the case occurred in ordinary practice.

One of the commonest difficulties which arise is the question of consent to an operation. It is settled law that a surgeon cannot lawfully operate against the express instructions of the patient. And it was said by the Court in the case of Slater *v.* Baker, decided as long ago as 1767, that—

"It is reasonable that a patient should be told what is about to be done to him, that he may take courage and put himself in such a situation as to enable him to undergo the operation" (see Slater *v.* Baker (1767), *English and Empire Digest*, Vol. 34, p. 549).

Consent by the patient, however, appears to be a question for the jury, and is readily assumed.

Mr. H. C. Dickens, a well-known barrister, in an address to the Medico-Legal Society of London, reported in the *Medico-Legal and Criminological Review*

for July 1933, mentioned the question as to how far a husband's consent to an operation on his wife is necessary, and if necessary at all, whether necessary for all operations or only such as may deprive her of child-bearing capacity. The learned lecturer said that it was difficult to see on what principle the husband's consent should be necessary, and asked whether it could be suggested that the wife's consent must be obtained to an operation which would deprive her husband of his virility. I can only express my humble agreement with the learned lecturer.

In this connection it is worth while to consider the cheerful position of a patient who undergoes an operation at a hospital, and has an instrument or a swab left in his body after he has been sewn up, a thing which not infrequently happens.

Under ordinary circumstances the hospital is not liable, for, as Lord Justice Kennedy said in the case of Hillyer *v.* Mayer, etc., of London (Governors of St. Bartholomew's Hospital) (see *English and Empire Digest*, Vol. 34, p. 550):

"The governors of a public hospital by their admission of a patient to enjoy in the hospital the gratuitous benefit of its care do, I think, undertake that the patient whilst there shall be treated only by experts—whether surgeons, physicians or nurses—of whose professional competence the governors have taken reasonable care to assure themselves. And further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances. But I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient, that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negli-

gently, in his treatment the apparatus or appliances which are at their disposal."

Incidentally, notwithstanding Lord Justice Kennedy's use of the word "gratuitous", it is improbable that the fact of payment being made would increase a hospital's liability.

Next there is the question of the surgeon's liability. There appear to have been cases where surgeons have been compelled to pay damages, but the question is one for the jury, and the law is not too clear. In the case of Crotch *v.* Miles where a pair of forceps had been left in a patient's abdomen, and a surgeon who had performed an operation ten years before was sued, the Lord Chief Justice said, not very helpfully:

"Nobody denies for a moment that if a surgical forceps is left in the body of the plaintiff in the course of a surgical operation, that patient ought to have a remedy in damages against somebody" (see *Medico-Legal and Criminological Review*, July 1933, p. 208).

His Lordship followed this up by telling the jury a number of things which they might or might not think and made it fairly apparent that he himself thought the surgeon ought not to go away without personally satisfying himself that the count of instruments and swabs was correct, concluding by saying:

"You have to address your minds to this question: suppose the theatre sister did miscount and thought there were six of these instruments when there were only five, is the defendant responsible for that happening? Is it a breach of duty on his part that the theatre sister made that mistake? You may think it is linked up with the question as to what he did afterwards."

In the particular case in question it happened that after the date of the operation performed by the defendant the plaintiff had undergone a further opera-

tion in France, where instruments and swabs apparently are not counted at all. This seems to have impressed the jury, and they found for the defendant.

It would seem fairly clear that in this country negligence by the surgeon is a question for the jury on the facts of each case, but in South Africa it appears to have been laid down as a matter of law that the surgeon is entitled to rely upon the sister's count and is not liable if she makes a mistake (see *Medico-Legal, etc., Review*, July 1933, p. 195). Mr. Dickens hopes that the English Courts will lay down the law similarly to those of South Africa, and there are decided cases which seem in principle to support this view. If so, the unfortunate patient will be left with only the sister against whom to take action.

It is probable that the medical profession stands lower in public estimation at the present time than it did a generation or so ago. This is mainly due to two causes, the introduction of the panel system and the increase of "expert evidence" by doctors in workmen's compensation and accident cases. The panel system, though it has on the whole been a good thing for the working-class public, has lowered the standards of the medical profession. The negotiations between the doctors and Mr. Lloyd George were not edifying, and the subsequent rush to get panel practices together was even less so. I remember being consulted by a doctor, himself the chairman of the committee dealing with the matter, as to whether he could allot to himself two panels, one in respect of his own practice, and another in respect of a practice which he had just bought and in which he proposed to employ an assistant. On my advising him that he could not properly do so he went to another solicitor who advised him that he could. This was an extreme case and the doctor referred to subsequently got into trouble with the British Medical Association, but it was typical of the "gold

rush " which took place at the time. It is notorious that panel patients do not receive the same attention from a large section, perhaps a majority, of the medical profession, that more remunerative patients do. A readiness to give certificates is an important asset in connection with a panel practice, and doctors who are scrupulous in this respect lose patients. In addition, the ridiculous restrictions placed by Government officials upon the prescriptions given for panel patients lower the standard of the profession. Further, it is possible for any young and inexperienced practitioner to buy a panel practice and attend all kinds of patients before he has the practical knowledge to enable him to do so. In the old days this was impossible, for he would have been throwing his money away by buying a big practice of paying patients.

As regards " expert evidence ", it has become a scandal in some County Courts, and at least one County Court judge has not hesitated to express himself strongly on the matter. Personally, I do not take the view, general among solicitors, common-law clerks and the officials of insurance companies, that you can buy a specialist to say anything to back up any sort of case. I admit that it often looks like it, when one hears two eminent medical practitioners who have just examined a man swear that there is little or nothing the matter and that work will be the best thing for him, followed a little later by two equally eminent gentlemen who declare, also upon oath, that the result of their examination has been to convince them that any exertion on the man's part will be probably fatal and certainly injurious. It is made quite apparent to the general public that medicine is far from being an exact science, and that little or no reliance can be placed upon the opinions of doctors, however eminent they may be. When to this is added the fact, well known to the legal profession, insurance companies and trade unions,

that specialists, in workmen's compensation cases, charge for giving evidence on the average about double what learned counsel get for conducting the case, it is little wonder that doctors are not so highly thought of as they used to be. So far do the possibilities of obtaining medical evidence go that I have been told by learned counsel, as a fact, of a case in Australia where a husband, finding his wife *in flagrante delicto*, shot her dead on the spot. On his trial for murder medical evidence was called for the defence to show that the woman had died, not, as the prosecution alleged, from the bullet wound, but from kidney disease of old standing entirely unconnected with the shooting.

Most people must have noted the difference in the attitude of doctors giving evidence at inquests according to whether the deceased had been attended by a registered medical practitioner or otherwise. If the deceased died with the orthodox accompaniments, then, however suspicious the relatives may show themselves, the medical evidence almost always is that everything possible was done. Should, however, the deceased have been a Christian Scientist, or otherwise unorthodox according to medical opinion, the evidence will usually be that life, even if not saved, could have been prolonged had a doctor been called in. There was a grim revelation at the inquest on a woman a year or two ago. Her doctor had diagnosed cancer, and warned her relatives that she must on no account be told of this. Nevertheless, the woman guessed the position, and committed suicide. At the subsequent inquest a post-mortem showed that she was not suffering from cancer. Another instance of the infallibility of medical science occurred in the case of a girl who had won a scholarship. Her parents were anti-vaccinationists, and protested strongly against the child being vaccinated as a condition of taking the scholarship. In the end

they gave way, she was vaccinated, and developed sleepy sickness with the result that her life has been ruined. I cannot personally vouch for the truth of this story, but it was told me by a doctor, not an anti-vaccinationist, whom I have known for many years.

It is possible that in the future lay opinion may demand greater control over the medical profession in view of the very extensive privileges they possess. The osteopaths and the psychologists are encroaching upon medical preserves, and the profession is likely to extend its boundaries, so as in effect to take them in. When this happens we shall have the medical psycho-analyst giving evidence in running down cases and shall look back regretfully on the comparative simplicity of traumatic neurasthenia and protective neuroses.

CHAPTER IX

ANIMALS

THE relation between man and the lower animals, so far as the law is concerned, was until the last hundred years or so a question of property. The law considers animals as divided into two classes, tame and wild. The first class, according to Halsbury's *Laws of England* (Vol. 2, 2nd edition, p. 531), "includes all such beasts and birds as by habit or training live in association with man". Wild animals include all such as are not classed as domestic or tame.

In Filow's Case (1521), decided in the reign of Henry VIII, Mr. Justice Brook held that there was a right of property in a bloodhound, and incidentally in his judgment remarked:

"If I have a singing bird, although it be of no profit to me, still it gives me pleasure, and if anyone takes it from me I should have an action. In this case a hound is useful for several purposes; it can go out with me and protect me from assault, or can track down a thief."

There is absolute property in tame or domestic animals, but there may also be property in wild animals if they are for the time being in captivity. The young of domestic animals belong to the owner of the mother, but there is a curious exception in the case of swans, in which the cygnets belong equally between the owner of the cock and hen. This was said to be due to the exceptionally faithful nature of the cock swan. The law with regard to swans is laid down in a case decided in the reign of Queen Elizabeth. The

reference is "Case of Swans" (1592), Coker Reports, 15 b, but the headnotes in the *English and Empire Digest*, Vol. 2, pages 206, 210 and 213, will be sufficient for most people. All white swans not marked and on an open or common water belong to the King. A swan was said to be of its nature a fowl Royal, as whales and sturgeon are Royal fish. There may, however, be private property in swans. Bees have been held, to quote from the headnote of the case of Quantrill *v.* Spragge (1907) (*English and Empire Digest*, Vol. 2, p. 209), to be "a sort of wild animals" but nevertheless to become the property of the man who hives them, and to remain his property so long as they can be seen and identified. Bees may be the subject of larceny.

The criminal law has always defended the right of property in most domestic animals useful to man either for service or food. In an ancient case it was, however, held that dogs, although the subject of property, yet "in respect of the baseness of their nature" could not be the subject of larceny. It was also held that bears, foxes and ferrets, although tame, could not be the subject of larceny, because they were not fit for food. A reclaimed hawk, however, though not fit for food, might be the subject of larceny, "in respect of the nobleness of its nature, and use for princes and great men", if it were known to be reclaimed. The true reason for these subtle distinctions was probably to be found in a humane desire on the part of the judges to avoid the infliction of the savage penalties for theft. This reason is suggested by the following quotation from the "Case of Swans" before referred to:

"A man may have property in some things which are of so base a nature that no felony can be committed of them, and no man shall lose life or member for them as of a bloodhound or mastiff."

As a result of this it used sometimes to happen

that a man was prosecuted for stealing the collar which a dog happened to be wearing, although he could not be punished for stealing the dog. The skin of a dead dog could be stolen. Now, however, all animals which have value and are owned by any person may be the subjects of larceny. There have been some curious cases with regard to these points. It has been held that the value need not be measurable by any coin known to the law, that is to say of a farthing (R. *v.* Morris (1840), *English and Empire Digest*, Vol. 15, p. 904). In another case a mad dog had bitten three pigs, and the owner had them killed and buried. A man dug up the bodies of the pigs and sold them. The jury found that the owner did not intend to abandon his property in the pigs, and it was held that the man who dug them up and sold them was properly convicted of larceny of the dead bodies (R. *v.* Edwards and Stacey, *English and Empire Digest*, Vol. 15, p. 904). There is, incidentally, no property in the corpse of a human being.

Heavy punishments may be imposed for stealing animals. The theft of horses, cattle or sheep is punishable with penal servitude for not exceeding fourteen years. Where not otherwise provided by statute, stealing animals which have value and are the property of any person can be punished by not more than five years' penal servitude. Stealing a dog or a bird, beast, or other animal ordinarily kept in confinement or for any domestic purpose and which was not the subject of larceny at common law is punishable by six months' imprisonment or a fine not exceeding £20 above the value of the animal. The old common-law distinction thus remains of some importance.

The bodies of wild animals which have been killed may be stolen. If, however, they are killed and taken away by the same person, this does not constitute the offence of larceny, unless the killer definitely abandons possession, and then comes back later with a fresh

intention of stealing. Where poachers netted or killed rabbits, hid them in a ditch, and three hours later came back for the rabbits, it was held that this did not amount to larceny (R. *v.* Townley (1871), *English and Empire Digest*, Vol. 2, p. 212). These highly technical distinctions are usually based on older cases in which the courts tried to avoid finding a man guilty of larceny, which was in many instances punishable with death as lately as last century. Pigeons are protected under circumstances which would not amount to larceny at common law, any person unlawfully or wilfully killing them being liable to a penalty of not exceeding £2 above the value of the bird. It is a good defence, however, that the pigeons were shot to protect the crops of the accused.

Unlawfully and maliciously to kill, wound or maim cattle is punishable with fourteen years' penal servitude, and unlawfully and maliciously to kill, maim or wound any dog, bird, beast or other animal not being cattle but being either the subject of larceny at common law or being ordinarily kept in a state of confinement or for any domestic purpose is punishable with imprisonment for not exceeding six months or a fine not exceeding £20 above the amount of the injury done.

There are many complications in connection with killing or injuring of animals, and popular misapprehensions have arisen through confusing civil and criminal proceedings, and assuming because a person charged under a particular section has been acquitted that he has committed no offence known to the law. For instance, it has been held that a person placing poisoned flesh in a garden for the purpose of poisoning a trespassing dog was not liable to be convicted of unlawfully and maliciously killing the dog, although the decision has been subsequently doubted. But it is clear that the accused could have been convicted

under the Poisoned Flesh Prohibition Act, 1864, Sec. 2, for having placed the poisoned meat in or upon land, and he would also be liable in a civil action unless he could show, which would be almost impossible, that his property could not have been otherwise protected.

There is a popular impression that a trespassing dog may be shot. This is a mistake. To shoot a dog merely because it is trespassing is both a criminal offence and an actionable wrong. To justify shooting a dog it must be shown that it was done in self-defence for the purpose of protecting property actually in danger at the time. The better opinion is that the shooting of a dog to protect game or other wild animals or birds is not legally justifiable, even though there may be no other means of protecting the game. The old case of Vere *v.* Cawdor in 1809 (*English and Empire Digest*, Vol. 2, p. 214) is indecisive. There was a dictum of Mr. Justice Blackburn in the case of Taylor *v.* Newman to the effect that a greyhound chasing a hare might be shot if the hare was in peril, but this was merely a dictum and the point under consideration was not raised. Halsbury's *Laws of England* (2nd edition), stating the law as at 1st May, 1931, is of opinion that the shooting of a dog can only be justified for the reasons above stated, and quotes with approval a considered judgment of Judge Ingham in Penrith County Court to this effect. The Irish Courts have held that a gamekeeper has no right to shoot a poaching dog as such, and in Canada damages have been recovered from a gamekeeper who shot a cat for the protection of his master's game. It is not sufficient to justify shooting a dog to show that it was ferocious and at large. The dog must be actually attacking when shot. Where a dog had bitten a man and then ran away, and the defendant shot it while running away, it was held he was not justified (Morris *v.* Nugent, *English and Empire Digest*, Vol. 2,

p. 214). And when the owner of some sheep which had been worried by a dog shot the dog in a field at some distance from the scene of the worrying it was held he was not justified, as the shooting was not done in defence of his property.

The setting of dog spears which may injure or kill trespassing dogs is not in itself an offence, but it may give rise to a charge of cruelty, as also may the setting of traps. And if traps are set near a highway or a place where dogs are kept, and baited in such a way as to attract dogs, the person setting them will be liable in damages to the owner of a dog thereby injured, and probably also criminally. The liability of a motorist who injures or kills a dog on the highway depends on whether negligence on his part can be established on the fact of the particular case. It is always difficult in such cases to prove exactly what happened. As a rule when a dog is run over its owner is at fault for not keeping the dog on a lead or otherwise under proper control. It does not, however, follow that the motorist who runs over a dog is not also to blame. Usually he is. I know a motorist of more than thirty years' standing, who drives almost daily and has driven at a speed of well over 100 miles per hour on the road, and who has never run over a dog. For the past seven years my wife and I have never had less than five or six dogs at a time, and sometimes over thirty, but not one has ever been run over, although we have always lived within a few hundred yards of a great main road.

The liability of the owner of an animal for damage which it does depends on various points. The simplest way of dealing with these is to consider the possibilities arising from the ownership of various animals. Take first the ownership of cattle and horses. A man is bound to keep his beasts from breaking out and trespassing, and if they do he is liable for such damage as they may in the ordinary

course be expected to commit. This was settled law as long ago as 1480. In the absence of evidence to the contrary, it is the duty of the cattle owner to fence to keep his beasts in, not for the land owner to fence to keep them out. There is an exception to the rule as to trespassing cattle in the case of their trespassing from the highway while lawfully there. In the absence of negligence the owner of the cattle is not liable, as this is a risk the owner of land adjoining a highway should himself guard against. It is an offence to allow horses or cattle to stray on the highway. But the owner of cattle or horses, which are valuable and domesticated animals and not savage by nature, is not as a rule liable for damage they may do to other animals unless they trespass. For instance, it was held in the case of Manton *v.* Brocklebank, decided in 1923, that when a man put his mare into a field, and the mare kicked a horse there, so that it had to be destroyed, the owner of the mare was not liable for damages. The reason for the decision was that he had no notice of any fact indicating that the mare was other than a harmless animal. Had, however, the mare been a trespasser in the field, her owner would have been liable (see Lee *v.* Riley (1865), *English and Empire Digest*, Vol. 2, p. 228). If cattle or horses injure human beings their owner is not liable in the absence of negligence unless he knew the particular animals to be vicious towards humanity. This brings us to the doctrine of scienter. A domestic animal is assumed by the law to be harmless and its owner is not, in the absence of negligence, liable for its mischievous acts unless he knows of the animals propensity in that particular direction. This knowledge is called scienter, and it has to be proved by the person making the claim. It is particularly important in the case of dogs. The owner of a savage bull kept in a fenced field is not liable to a trespasser whom it attacks and injures.

If a person keep a tiger he does so at his own risk, and is liable, independently of negligence or scienter, if it escapes and does damage, for a tiger is classed as a dangerous animal. Monkeys and elephants have also been held to be dangerous animals, although individuals have been tamed and domesticated. If, however, a dangerous animal is kept in a place of security, the owner is not liable in case someone goes into the place and gets injured. There is as a rule no liability for trespass and damage by wild animals which leave a person's land and go on to that of another, for as soon as they cross the boundary such rights over them as there may be pass to the owner of the soil on which they come. If, however, a person brings game or other wild animals on his land in excessive quantities and they escape and do damage he may be liable. The recent plague of musquashes and the damage they have done may possibly give rise to litigation, but evidence against any particular person would be hard to get, and the damage would usually be too remote.

For the average citizen, the animal he is interested in is the dog, and the three things he knows about the law relating to dogs are that it is necessary to take out a dog licence when the dog is six months old, that it must wear a collar with its owner's name and address in public, and that every dog is entitled to its first bite, which, incidentally, it isn't. As we have seen, a dog was not formerly, but now is, the subject of larceny. Dog-stealing, however, once a flourishing industry, is now a thing of the past. A dog without a pedigree has only a nominal value, and as most dogs of any considerable value are registered with the Kennel Club, it is useless to steal. A good gun-dog might have value without a pedigree, but no one would buy such a dog without knowing its history. The only exception is a racing greyhound, which might be sold or used by the thief for racing on an unlicensed

track, and dogs are said occasionally to be stolen for export.

For a dog to trespass upon land does not render its owner liable to an action for damages, unless he either intentionally sent it there in pursuit of game or allowed it to be at large knowing its poaching habits. The dog may, however, be seized as a distress damage feasant by the owner or occupier of the land, that is, taken and impounded to secure compensation for damage done. As we have seen, the fact a dog is trespassing is no justification for shooting it.

The owner of a dog is under an absolute liability for damage done to cattle or poultry. It is not necessary for the claimant to prove that the owner was aware of the dog's mischievous tendency, nor that there was negligence on the part of the dog owner. So far does the liability go that where a dog owner had several times warned the owner of sheep to prevent them from trespassing on his land, and the sheep nevertheless trespassed, and the land-owner's dog worried and killed a sheep while they were being driven off his land, he was held liable although the sheep were trespassing at the time (Grange *v.* Silcock (1897), *English and Empire Digest*, Vol. 2, p. 215). The occupier of any premises where the dog was kept or permitted to remain at the time the damage was done is presumed to be the owner unless he proves the contrary. The word " cattle " includes horses, mules, asses, sheep, goats, and swine, and " poultry " includes domestic fowls, turkeys, geese, ducks, guinea-fowls, and pigeons. At common law it was necessary to prove scienter in order to make a dog owner liable for injury to cattle or poultry, but the law was altered by the Dogs Acts of 1865, 1871, 1906 and 1928. If the damages do not exceed £5 they can be recovered before the magistrates in a Court of Summary Jurisdiction. A cat, however, has still the advantages of the common law, and before its owner can be made liable for fowls

or pigeons killed by a cat it is necessary to prove scienter on his part (see Buckle *v.* Holmes (1926), *English and Empire Digest*, Vol. 2, Supplement).

An owner or occupier of land may exercise the ancient remedy known as distress damage feasant against animals trespassing and doing damage. It has, however, been settled law for centuries that animals in actual use cannot be distrained upon, as for instance a horse actually being ridden. It is not infrequent for trespassing cattle to be distrained damage feasant at the present time. The person distraining them seizes them and " impounds " them, i.e. shuts them up in a safe and proper place on his own or borrowed premises. There are very few common pounds in use now, though they may still be seen in some villages. The law with regard to distress damage feasant is highly technical, and for the most part of antiquarian interest only. There is an old story that an Italian Jurist boasted that he would debate with any living man upon any subject, whereupon Sir Thomas More, then a promising young lawyer, offered to debate with him as to whether cattle distrained damage feasant in withernam could be replevied. There must be actual damage, and the animal must be distrained upon while on the land. There is no right of following the animal once it leaves the land, and though this is commonly done it is illegal. The animals distrained are merely held as security for payment of the damage. The person distraining must not make use of them, and must feed and care for them.

A Court of Summary Jurisdiction, that is, magistrates in a " Police Court ", on complaint that a dog is dangerous *and* not kept under proper control, may make an order for the dog to be kept by the owner under proper control or destroyed, under a penalty of not exceeding 20s. for every day's default. A dog may be dealt with under this section as a dangerous

dog not only where it is dangerous to mankind but also where it is proved to have injured cattle or poultry or chased sheep, and it is not necessary to prove that the owner knew the dog to be dangerous before making an order. The provision as to chasing sheep is unfair, for owing to the habit of sheep of coming up and staring and then suddenly bolting away many a young dog runs after them in mere playfulness. Whether a dog is under control or not is a question of fact and not of law. The power to order a " dangerous " dog to be destroyed is often abused, especially by country benches. I remember a case in which I appeared a few years ago. A miner had been fined for being drunk and disorderly shortly after the Miners' Strike and while there was still a great deal of ill-feeling in the district. A complaint by the constable who had arrested him that the miner's dog, a white bull terrier, was dangerous and not under proper control, was then heard. The only evidence was that of the constable, who swore that when he went to arrest the man, who was lying on the ground dead drunk, the dog, which was watching over its master, had attacked him. By a majority, the bench ordered the dog to be destroyed, and, the miner having no money to appeal, destroyed it was. During the seven days it awaited destruction at the police station it was a great pet there, I was told, as it had always been at the miner's home.

Under Sec. 28 of the Town Police Clauses Act 1847 every person who suffers to be at large any unmuzzled ferocious dog or sets on or urges any dog or other animal to attack, worry or put in fear any person or animal is liable to a penalty of not exceeding 40s. or fourteen days' imprisonment. It is probably unnecessary to show that the owner knew the dog to be ferocious. It is a pity that this section is not more frequently enforced against the pestilent people who encourage their dogs to fight. A quarrelsome dog

is a serious nuisance in the streets, and many peaceable dogs have their tempers spoilt and their usefulness lessened by being attacked unexpectedly by one of these pests, often encouraged by its owner. It is an assault to encourage a dog to bite a person.

So far as human beings are concerned the dog owner is still protected by the doctrine of scienter, and damages for a dog biting a person cannot be recovered without evidence that the owner of the dog had notice of its disposition to bite mankind. It is not necessary to show that the dog has actually bitten anyone previously to the attack complained of. It is sufficient to show that it has, to the knowledge of its owner, evinced a savage disposition by attempting to bite (Worth *v.* Gilling, *English and Empire Digest*, Vol. 2, p. 245). So long ago as 1701 it was held that one previous bite, known to the owner, is enough to prove scienter. The knowledge of a servant who has the care and control of the dog has been held to be the knowledge of the master, although the latter believed the dog to be harmless (Baldwin *v* Casella (1872), *English and Empire Digest*, Vol. 2, p. 245). And even though the servant had not the care of the dog, if complaints as to the dog are made to servants who in the absence of the owner are managing his business, there is prima facie evidence of scienter (Applebee *v.* Percy (1874), *English and Empire Digest*, Vol. 2, p. 246). Evidence that the dog has attacked and bitten animals is not evidence that it is ferocious towards human beings (Osborne *v.* Chocqueel (1896), *English and Empire Digest*, Vol. 2, p. 245). It is said on high authority (Halsbury's *Laws of England*, 2nd edition, Vol. 1, p. 541), that—

" Negligence in the person injured may be pleaded as a defence, but a person who pats a dog which springs at and bites him is not guilty of contributory negligence."

This statement of the law is doubtless correct

although Irish and Scottish decisions only are cited in support, and an English case, Smith *v.* Pelah, decided in 1747, implies that contributory negligence on the part of a person formerly bitten does not prevent the bite being evidence of scienter. But the second part of the proposition shows how far law may be removed from common sense. "Let sleeping dogs lie" is proverbial wisdom which may be assumed to be known to everyone, and anyone who pats a strange dog, or approaches it from behind, is asking for what he may get. In a case last year before a very learned County Court judge I represented a plaintiff who recovered damages from the owner of a dog which he had patted and which had promptly bitten him, but in this case the owner, who knew the dog was savage and had previously bitten people, had taken it into a crowded bar room, which practically amounted to an invitation to persons present to pat it.

A dog owner may be liable on the ground of negligence for injury caused by his dog, without any evidence of scienter. For instance, to exercise greyhounds coupled together on a public highway in the dusk was held to be negligence in a case where the greyhounds ran into a passenger, knocking him down and breaking his leg (*English and Empire Digest*, Vol. 2, p. 233). This principle applies as against the owners of all domestic and harmless animals, and so do the cases on scienter, in the same way as with regard to dogs. The question of negligence depends on the facts of each particular case. For instance, to let a blind dog run loose in the street, whereby a cyclist was thrown down and injured, has been held not to be actionable negligence, and so also with regard to sheep straying on the highway, and a flock of sheep being driven along it at night without a light. But to allow a young unbroken colt to run loose when being taken along the highway on a dark night has been held to be negligence.

Stray dogs may be seized by the police and sold or destroyed after seven clear days unless reclaimed by their owners, and the expenses incurred paid, but the police are bound where the owner is known to serve him with notice that this may be done unless the dog is claimed within seven clear days after service of the notice. No dog so seized may be given or sold for the purpose of vivisection. Any person other than the police taking possession of a stray dog must forthwith either return the dog to its owner or take it to the nearest police station and give information as to the finding. The finder may then leave his name and address at the station and remove the dog, but is bound to keep it for not less than one month. If he does not keep the dog it will be treated as a stray dog seized by the police.

Local authorities may make orders placing restrictions on all dogs not under the control of any person if a mad dog, or dog suspected to be mad, is found within their jurisdiction. It is an offence for the owner of a dog which is, or which the owner has reasonable ground for supposing to be, in a rabid state, or to have been bitten by a dog or other animal in a rabid state, to allow it to be at large. It is also an offence to disobey a justice's public notice directing dogs to be confined on account of suspicion of rabies. It is probable that many of the cases of supposed canine madness in the past were actually due to hysteria. A dog suffering from hysteria very commonly rushes in any direction, howling wildly and sometimes frothing at the mouth, taking no notice of its owner or anyone else. It is very rare for dogs suffering from hysteria to bite, and when they do so it is due to a convulsive closing of the jaws.

The ordinary law as to the sale of goods applies to the sale of animals. There are, however, some special points to bear in mind. When buying a horse it is important to get a written warranty as to any

qualities, such as soundness or quietness in harness. Although any statement of fact made at the time of and before completion of a sale and intended as a warranty is held to be a warranty, yet there are several catches about this, and the ordinary layman will think that the law is out to protect the fraudulent seller. For instance, in the case of Anthony *v.* Halstead (*English and Empire Digest*, Vol. 2, p. 267) the following words in writing, " a black horse, rising five years, quiet to ride and drive, and warranted sound up.to this date, or subject to the examination of a veterinary surgeon ", were held not to be a warranty that the horse was quiet to ride and drive. In the case of Richardson *v.* Brown (*English and Empire Digest*, Vol. 2, p. 267) the words, " a black gelding, about five years old, has been constantly driven in the plough—warranted ", was held to be a warranty of soundness only, and not that it had been constantly driven in the plough. The ground of these decisions was that if the word warrant is used the warranty extends only to what follows it, the other words not being intended as a warranty.

A warranty does not cover defects which are obvious and which the purchaser can see for himself. In a case decided in 1471 (Anon. (1471), *English and Empire Digest*, Vol. 2, p. 261) it was held that if a man sold a horse and warranted it to have two eyes, if it had not an action would not lie, for the purchaser might have known this for himself. In a still earlier case (Drewe *v.* E. (1412), *English and Empire Digest*, Vol. 2, p. 261) it had been held that " if from the confidence that I have in you I buy a horse from you in another place than that in which the horse is, and you warrant it sound in all its members, whereas in fact it is blind, I shall have a good action of deceit against you ".

On a breach of warranty the buyer has no right to return the horse, unless under express agreement to that effect. He should offer to return it to the seller,

and if this is refused, should sell it. If the buyer tenders the horse to the seller he can claim from him its keep for a reasonable time, but not if he does not offer to return it.

Generally speaking, principles similar to those stated with regard to horses apply to warranties on the sale of other animals. It is peculiarly difficult, however, to deal with the question of buying gun-dogs, for a dog may be well broken and work excellently for one man and be useless with another. Moreover, a trained dog can be spoiled very quickly by bad handling.

The question of cruelty to animals raises difficulties for many people both in connection with property and the making of profit and with what are often called " blood sports ". Without considering the popular attitude towards these matters it is difficult to understand how the law has come to be what it is. It is useful also to consider the direction in which reform is likely to have popular support. One of the most appalling things about humanity is its lack of imagination and indifference to suffering which is not actually before it. Many people pride themselves on the fact that they never think about such things as, for instance, slaughterhouses and the cruelties committed there. There is, on the other hand, a queer sentimentality regarding nature which has grown up since the War, probably to some extent as a reaction from its brutal realities. It has been considerably influenced by the work of that excellent writer, not very profound naturalist, and arch-sentimentalist, the late W. H. Hudson. This outlook is well illustrated by an incident referred to in an article on W. H. Hudson in *John o' London's Weekly* a year or two ago. Hudson saw " with suppressed indignation " a wild goose which had been shot by a fowler. The writer, a friend of Hudson's, mournfully remarks :

"The proud life was gone, taken heedlessly by a fool. . . . Never again would it outwit its enemy, man."

A little later he says that what Hudson "particularly admired" about the wild geese was "their craftiness and cunning in forestalling man's designs upon them".

Here you have the anti-humanity complex in its crudest form. The craftiness and cunning of the geese are extolled, yet the man whom the goose failed to outwit is described as a fool. Why? A goose is good eating and in great demand, so it cannot be the folly of wanton destruction which is meant. The truth is that Hudson shared in the strange perversion which makes certain animal lovers write indignant letters to the papers demanding the flogging of those guilty of cruelty to animals. I have repeatedly heard magistrates, when pronouncing sentence in cases of cruelty to animals, say they wished they could inflict flogging as a punishment. On 5th April, 1933, two men were each sentenced to two months' imprisonment at Nottingham for beating a dog to death. They had found it in a trap and in excuse said it attacked them when they tried to release it. The presiding magistrate is reported to have said: "If I could order you the cat I would; I am not allowed to do it." Probably the reader would have thought or said the same thing had he been sitting on the bench. Certainly I should myself. Incidentally, there was nothing to prevent the men being given three months instead of two. It is, however, probable that some of the more enthusiastic opponents of corporal punishment would wish that the chairman in question could be given the opportunity of himself undergoing the cat. I do not extenuate the brutality with which the dog was treated, but many cases of cruelty to animals are the result of a loss of temper on the part of the

man, and to flog the human criminals would merely be to repeat the offence.

W. H. Hudson was full of sentimentality, and delighted in inducing emotion for its own sake. Thousands of men and women who couldn't tell a rook from a crow, or a swallow from a house-martin, revel in his writings, and those of his imitators. At the moment the most popular of the "Nature School" is Mr. Henry Williamson, author of *Tarka the Otter*. Mr. Williamson is an admirer of Richard Jefferies, but his knowledge of wild life has probably been deliberately acquired, and not, like that of Jefferies, instinctively absorbed from childhood. In Mr. Williamson's book *The Pathway* he makes queer little mistakes such as speaking of "solan geese" coming down from the north, honking overhead, and being eaten. Actually a solan goose is a gannet, not a goose at all, and about as eatable as a cormorant. Probably less so, for the Solway fishermen used sometimes to eat cormorants even in my time, but I never heard of anyone eating a gannet. The heroine of the book feeds a spaniel on rabbit bones, and, like a true humanitarian, releases a broken-legged rat to hop away. But it is not the inaccuracies of Mr. Williamson's catalogues that matter so much as the spirit of his work, the notion that the lower animals, birds and plant life are somehow holier and better than humanity, and that a life of sentimental contemplation of, say, the love affairs of frogs is better than that of the ordinary working world.

This depreciation of humanity is prevalent just now. One meets it everywhere. There are the people who praise the virtues of dogs and compare them favourably with men. What they often admire, with a strange lack of logic, is the superstitious reverence the dog pays to humanity. Actually, dogs among themselves are generous, greedy, kind, selfish, brave, treacherous and cowardly just as men are.

Then there are the people who hold forth about the perfect health of animals. If you refer them to the experience of breeders they generally shift their ground and pretend they mean wild animals. They know nothing of the mangy fox, the verminous hedgehog, the diseased rabbit, and the innumerable other ills of wild life. The attitude of Peter Bell towards the primrose by the river's brim may not have been ideal, but at least he did not hypnotise himself by staring at it. Moreover, he recognised it as a yellow primrose, and did not imagine it to be a daffodil or a sunflower.

With regard to "blood sports" it is probable that hunting, shooting, and fishing are doomed. They are the sports of a minority, small in number and peculiarly incapable of putting forward its case. It is true that men have written excellently about their favourite sports, but not for purposes of controversy. As a rule field sports are defended with a spluttering indignation, often accompanied by threats of violence, which makes the worst impression on the general public. Hunting will most likely go first. Fox-hunting interferes too much with the by-products of agriculture, such as poultry-keeping, to last much longer. The spectacular foolishness of certain supporters of the Devon and Somerset Stag-hounds has also had its effect. Bitter remembrances of the past iniquities of the Game Laws will help to abolish shooting; and fishing for sport may be ended partly by the pollution of our streams and rivers and partly by a desire to be consistent.

But to admit that a thing probably will happen is not an admission that it ought to happen. What are described as "blood sports" are commonly attacked on the ground of cruelty. If by cruelty pleasure in pain and suffering is meant, then it is absurd to suggest that those who take part in field sports are cruel. A wounded bird not recovered, a

hare hit but gone away, will spoil any genuine sportsman's day more completely than any number of clean misses. The fox-hunter's regret when a fox escapes is because of the effect upon the hounds, not because he takes pleasure in the kill as a kill. The prehistoric custom of "blooding" has done more than anything else to disgust people with hunting, but it is a sign of callousness, not of cruelty. The pleasure of field sports lies in matching one's own skill and cunning against that of wild creatures. If the contest becomes unequal the pleasure goes. Mr. Bernard Shaw's comment on Macaulay's saying as to the Puritans and bear-baiting was as silly as Mr. Shaw's comments on matters of feeling usually are. Except by a minority of sadists no pleasure was taken in the pain of the bear; probably most of the spectators never conceived of a bear as suffering pain. The excitement of the fight was the thing, just as with those who watched prize-fights, and now look on at glove-fights. Dr. Butler quotes Arrian, a keen huntsman writing on his favourite sport 1800 years ago, as having his pleasure spoilt by the distress of the hare. This point of cruelty is of importance because once it is realised that there is no sadistic element in field sports the question becomes a comparatively simple one as to the amount of suffering and pain involved.

With regard to stag-hunting I have no first-hand knowledge, but there does appear to be an element of brutality in the method of the kill, although it does not approach what goes on in slaughterhouses, and rowing out after a quarry which has taken to the water seems revolting in cold blood. The supporters of field sports will do well to disassociate themselves from stag-hunting. Otter-hunting is another form of sport involving keen suffering, for it is carried on during the breeding season. Owing to the fact that the otter is given as little chance as

possible, otter-hunting is disliked by many sportsmen. In fairness it should be said that the otter is a fierce fighting animal of the weasel tribe and as it dies fighting suffers comparatively little at the end. The hare's great timidity is an objection to hare-hunting, for although the hare often escapes, she undoubtedly suffers a great deal through excessive fear. But fear is a hare's normal state and it is only her extreme fearfulness which enables her to survive without the shelter of an earth or burrow. With regard to fox-hunting Mr. Masefield's " Reynard the Fox " perhaps exaggerates the suffering of the quarry by humanising the animal. The run was of very unusual length, and most likely the fox was more optimistic as to his chances than the poet tells us. The better the run, however, from the hunter's point of view, the greater are the sufferings of the quarry. To see a fox dragging itself along at the end of a run is a horrible sight. As to all hunting it must be borne in mind that deer, foxes, otters and hares would in any event have to be reduced in numbers by killing many of them. Shooting would be an easier, trapping a more painful, end.

Shooting, whether of game, wildfowl or ground game, does, I fear, involve a good many birds and animals getting away wounded. This is often denied by shooting men of wide experience, but they do not realise that it is inferior shots, ill provided with dogs, who form the great majority of those who shoot. The really bad shot is harmless enough. It is the man who kills about a third of the number he shoots at who often wounds as many as he kills. I do not mean the man who has a bird in the bag for every three cartridges used at driven birds, but the man who lets off both barrels at every bird that rises within fifty or sixty yards of him. It is inevitable that many of the wounded are not recovered. Wounded birds, however, possibly do not suffer

much pain. Either they die quickly, or else they may generally be found feeding, apparently quite cheerfully, with their fellows.

Fishing involves little pain, but a good deal of fear and discomfort to the fish. It is a common occurrence for a fish to be caught again soon after having been hooked and escaped. No modern fisherman fails to kill his fish as soon as landed, though in White of Selborne's day few would trouble to do so.

That those who take part in field sports, including hounds and gun-dogs, derive keen pleasure therefrom cannot be denied. That the pleasure is heightened by certain ancient hunting instincts present in most of us is nothing to the bad. Why should it be illegitimate to set off this pleasure and the health derived from the practice of field sports against the comparatively small amount of suffering incidental thereto? The limit of the humanitarian protest against the horrors of the slaughterhouses, except for a few vegetarians, is the advocacy of the humane killer. This reform, though an excellent one, would touch only the fringe of slaughterhouse cruelties. Practically without protest from anyone, farmers castrate tens of thousands of cattle, pigs, and lambs, without anæsthetics, and with absolute callousness. The pain involved is intense, but because of commercial advantage it is accepted as a matter of course. Members of Parliament, a hundred years ago, roared with laughter at the suggestion that dogs should be included in a bill dealing with cruelty to animals. A bill dealing with the cruelties habitually inflicted by farmers would meet with a similar reception to-day. Why should humanitarians ignore a vast amount of pain and suffering merely because to abolish it would cause a certain amount of financial loss and inconvenience while they are not willing to balance the health and happiness of the sportsman against a relatively small evil?

Generally speaking, cruelty to animals is now governed by the Protection of Animals Act 1911 and various amending acts. Certain points are dealt with by acts dealing with vivisection, pigeon shooting, etc., performing animals and the protection of birds. The acts relate to domestic and captive animals, but not those in a wild state. Unfortunately, the legal definition of cruelty, though verbally satisfactory, in fact postpones the definition and leaves the matter unduly open for the court to decide in accordance with its own prejudices.

Halsbury's *Laws of England* (2nd edition), Vol. 1, on p. 584, says:

"A terse and satisfactory definition of the cruelty aimed at is 'the unnecessary abuse of the animal'."

This is an old definition arrived at in 1863. It has been generally accepted by the courts. The decisions of the judges who have attempted to apply it cannot, however, be reconciled. In the case of Ford *v.* Wiley, decided in 1889 (*English and Empire Digest*, Vol. 2, p. 289), Lord Coleridge, discussing what could be considered reasonably necessary, said that merely to show things to be convenient and profitable to the owner of the animal did not prove them to be necessary. He added:

"That without which an animal cannot attain its full development or be fitted for its ordinary use may fairly come within the term 'necessary', and if it is something to be done to the animal it may fairly and properly be done. What is necessary, therefore, within these limits I should be of opinion may be done, even though it causes pain, and extreme pain, but only such pain as is reasonably necessary to effect the result aimed at." (The quotation is from the Justice of the Peace Report, Vol. 53, p. 487.)

In the same case Sir Henry Hawkins said:

"To support a conviction, then, two things must be proved; first, that the pain and suffering has been

inflicted in fact; and, secondly, that it was inflicted cruelly—that is, without necessity, or in other words, without good reason." (See Justice of the Peace Report, Vol. 53, p. 503.)

Sir Henry Hawkins also said:

"Even where a desirable and legitimate object is sought to be attained, the nature of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable that the object should be abandoned rather than the suffering should be inflicted."

The case of Ford *v.* Wiley was one in which magistrates had refused to convict a man who had sawed off the horns of thirty-two oxen at the root, inflicting great agony. The evidence of the Principal of the Royal Veterinary College at Edinburgh was that the operation caused excruciating pain, which would be continued more or less for a fortnight and probably longer. He compared the pain to that caused by cutting through the quick of a man's finger-nails. On the other hand the dishorned cattle could be packed closer in a yard or truck than horned cattle, and therefore fetched £1 a head more. The magistrates held that the accused acted under the honest belief that the operation was for the benefit of the animals themselves as well as for the benefit of himself as a grazier, and that the object he had in view could not be attained by any other known method.

The judges held that the magistrates ought to have convicted, and allowed the appeal with costs. The dishorning of cattle over one month old must now be performed under an anæsthetic (Animals (Anæsthetics) Act 1919).

The case of Bowyer *v.* Morgan was decided in 1906 (see *English and Empire Digest*, Vol. 2, p. 289). Magistrates had refused to convict a farmer who was summoned for cruelty to lambs by branding them

on the nose with a hot iron for the purpose of identification. Four veterinary surgeons, three for the prosecution and one for the defence, agreed that " the branding on the nose with a hot iron would cause excessive pain; the burning sensation would last thirty or forty hours ".

The justices having found that the practice of branding, though causing substantial pain and suffering, was reasonably necessary for the purpose of identification, the appeal was dismissed, although Lord Alverstone, then Lord Chief Justice, said he did so with great reluctance, and on the evidence he should not have come to the same decision as the magistrates. Mr. Justice Bray distinguished the case from Ford *v.* Wiley by pointing out that in that case the magistrates had not actually held that dishorning was necessary, but only that the accused had honestly believed that it was. Mr. Justice (now Lord) Darling appears to have considered the case a humorous one, and took full advantage of his opportunity.

The result of these cases is that unless there is no evidence upon which magistrates can find as a fact that the cruelty is necessary, their decision cannot be interfered with. It is obvious that in agricultural districts it will usually be impossible to obtain a conviction for cruelty against a farmer for doing anything which is customary in his locality, however unusual it may be in other parts of the country. It is clear that almost any cruelty may be justified as " necessary " by a complaisant bench of magistrates since the decision in Bowyer *v.* Morgan. It is hard for the townsman to realise the utter callousness of the average farmer, drover, and butcher towards the suffering of animals. I am not referring to sadists such as Mr. Gilbert describes in his sketches of rural England, but to the average man and woman in the agricultural districts. Animals are looked upon in exactly the same way as crops or trees. The horrible

business of castrating calves, lambs or pigs, for instance, is taken as much as a matter of course as pruning or weeding. Mr. Cunninghame-Graham somewhere mentions the surprised incomprehension of some South Americans at his reluctance to spur an exhausted horse. The average agriculturalist is equally uncomprehending with regard to the pain of animals other than those which happen to be pets. It may be noted with regard to operations that it is not legally necessary to administer an anæsthetic when castrating a dog or cat unless the animal is six months or more old, nor apparently to administer one at all in the case of horses, cattle and sheep, although for some other operations it is required by law (Animals (Anæsthetics) Act 1919).

The cruelty that goes on in the slaughterhouses and in connection with the driving of beasts to market is very great. It is rarely that cruelty in slaughterhouses becomes known, unless through private complaints. I remember defending in a case some years ago where two youths of sixteen and eighteen had slaughtered a cow in the absence of the regular man. I do not wish to go into details. It is sufficient to say that they took twenty minutes over the job from the first blow struck until the cow was dead. A disquieting feature of the case was that no one in the trade seemed to think there was anything extraordinary about what the youths had done, neither were they in any way abnormal or cruel. As a result of the case I took some trouble to investigate slaughterhouse conditions, which are in most cases very bad indeed. Apart from the old-fashioned prejudices against the use of the humane killer, no sufficient precautions are taken to prevent the animals waiting their turn from smelling blood and knowing what is going on. Intentional cruelty by individuals is a vile thing but comparatively rare. The law is adequate to deal with detected cases and in the towns inspection is reasonably good.

What is necessary is a reconsideration of the whole question of to what extent cruelty for profit, whether in sale or use, is justifiable, and a limitation of the power of magistrates to find "necessity" as a fact.

The extent to which commercial considerations enter into this matter is shown by the way in which the Picture Houses exhibit films which obviously have been produced by means which have involved extreme suffering. The only thing that is not faked about most of the wild beast pictures that are shown is the cruelty which is inevitable in their production. A minor point which is peculiarly horrible to those who know what wild animals suffer when trapped or closely confined is the way in which captured beasts are bound and dragged about in a helpless state.

The laws as to cruelty to animals do not apply to the coursing or hunting of any captive animal unless such animal is released in an injured, mutilated or exhausted condition. The result is that the gross cruelty often involved in hunting carted deer is perfectly legal.

As Mr. Justice Channell said in the case of Rodgers *v.* Pickersgill (*English and Empire Digest*, Vol. 2, p. 289):

"It is expressly said that the Act is not to apply to hunting; it does not say to sportsmanlike hunting; it does not say to hunting which is not cruel or anything of that sort, but it does not apply to hunting."

The following is an extract from the headnote of the case of Rodgers *v.* Pickersgill:

"A hind which was not in a mutilated or injured state was released and hunted, and three times it took refuge in a yard from which it was dislodged by being prodded and beaten. On two occasions it charged against barbed wire, trying to break through. Two men were seen to get hold of the neck of the hind, which had turned and was fighting with its forelegs, and put a whipthong round it and pull it along by the neck, and another man pulled its tail, endeavouring

to get it out of the yard. They dragged it a short distance, when it fell down in the yard exhausted. It was lifted and dragged in the same manner through the gateway on to the road, where it again fell down exhausted. It lay there for a short time, when it was again lifted up and dragged along the road in the same way as before for about 15 or 16 yards, when it fell down again and died. The hind had a wound in its chest, which was bleeding, caused by the barbed wire against which it had charged, as mentioned above, it was bleeding at the hocks and it was exhausted."

At the close of the case for the prosecution it was submitted before the magistrates that there was no case to answer, as all the acts took place while the hind was being hunted. The magistrates agreed, and dismissed the case. On appeal, the case was remitted to the justices, not with a direction to convict, but to hear further evidence as to whether the hunt had or had not come to an end. Mr. Justice Channell, in a dissenting judgment, was of opinion that the justices were right in holding there was no evidence of cruelty within the Act.

Comment seems needless. Rodgers *v.* Pickersgill is still the leading case on the question of hunting captive animals, for later legislation has not altered the law in this respect.

The maximum punishment for cruelty to animals, however atrocious, is a fine of £25 and/or three months' imprisonment.

Under the Protection of Animals Act 1911, Sec. 10, any person who sets or causes to be set spring traps for hares or rabbits must have them inspected at reasonable intervals of time and at least once every day between sunrise and sunset under a penalty of £5. I assume that an inspection at sunrise on one day and sunset on the next would not be held to be at a reasonable interval, but even so an animal may legally be left in a spring trap for twenty-four hours. This

is the usual way of procuring rabbits for the markets. The townsman likes a trapped or snared rabbit. In my experience the countryman much prefers one which has been shot, and he knows much more about the matter. It is likely enough that the horrible suffering of the trapped rabbit may make its flesh unwholesome.

The shooting of captive birds which are liberated for the purpose is illegal. This applies to all birds, though pigeons, starlings and sparrows were the ones used. Clay pigeon shooting is now quite as popular as pigeon shooting was. It is exceedingly hard to see why the hunting of captive deer, which is far crueller than pigeon shooting, should remain legal. Probably the explanation is that pigeon shooting was forced on the notice of large numbers of people, while hunting is not. Few people are troubled by what they do not actually see, or the slaughterhouses could not continue as at present.

In addition to the general law as to cruelty, which applies to all birds in captivity or confinement, it is an offence punishable by a fine of £25 and/or three months' imprisonment to keep a bird in a cage of size insufficient to allow it freely to stretch its wings. Though this is better than nothing, it is grossly insufficient for birds of active habits such as the magpie or lark. To put any bird in a cage is to show callous indifference to suffering or a complete lack of imagination.

Under the Wild Birds Protection Acts the killing or taking of wild birds between 1st March and 1st August in every year is prohibited under a penalty of £1 in respect of certain scheduled birds and a reprimand and payment of costs for the first offence and 5s. and costs for subsequent offences in respect of every other bird. Except with regard to the scheduled birds these provisions do not apply to the owners or occupiers of land, or anyone authorised

by him, killing or taking birds on such land, so the sacred rights of property are fully protected. The killing of birds during the breeding season is obviously extremely cruel. The taking or destroying of wild birds' eggs may also be prohibited in any area under an order made by the Secretary of State upon the application of a local authority. In my experience borough magistrates treat offences under the Wild Birds Protection Acts with as much severity as possible, while the country benches, except where some question of trespass is incidentally involved, tend to regard prosecutions as absurd.

The question of vivisection has been so fully debated that it is unnecessary to do more than briefly outline the law.

Experiments calculated to give pain may be performed upon living vertebrate animals by persons licensed for that purpose, but by no one else, under a penalty of £50 for a first offence and of £100 or three months' imprisonment for a second or subsequent offence.

Licences are granted by the Home Secretary, and applications for licences must be signed by the President of certain specified societies and also by a professor of medical subjects in a university or college in Great Britain or Ireland. A professor cannot sign his own application, but must get the signature of some other professor. Conditions may be attached to the licence.

The Home Secretary may insert a provision in any licence that the place where any experiment is to be performed by the licensee must be registered in accordance with orders and approved. This is provided by Sec. 7 of the Cruelty to Animals Act 1876. According to Halsbury's *Laws of England*, 2nd edition, p. 596, revised to 1st May, 1931,

"No general or special orders have yet been issued under this section."

After all, fifty-five years are as a day in the sight of the Home Office.

Inspectors are appointed by the Home Secretary for the purpose of seeing that the law is observed. How they are to do so it is not easy to see.

The following restrictions are imposed on licensed vivisectionists :

Experiments calculated to give pain must be performed in a registered place, and with a view to new discovery of physiological knowledge or of knowledge which will be useful for saving or prolonging life or alleviating suffering. During the whole of the experiment the animal must be under an anæsthetic (other than urari or curare, which apparently have a merely paralysing effect) of sufficient power to prevent its feeling pain. If pain is likely to continue, or if serious injury has been inflicted, the animal must be killed before it recovers from the anæsthetic, unless a certificate is given that this would render the experiment useless.

Experiments must not be performed for the purpose of illustrations in medical schools unless a certificate has been given that the proposed experiments are absolutely necessary for instruction in physiological knowledge, or knowledge useful for saving or prolonging life or alleviating suffering.

Painful experiments may be performed without anæsthetics on a certificate being given that insensibility would frustrate the object of the experiments.

No experiment may be performed upon a dog or cat without anæsthetics unless, in addition to the previous requirements, it is certified that the experiment will be useless unless performed upon a dog or cat, and there are similar provisions with regard to painful experiments on horses, asses or mules.

Theoretically, I suppose the law is roughly in accordance with the present state of public opinion. Practically, I fear there is no reason to suppose that

professors are more scrupulous about questions of vivisection than doctors are about giving certificates that their patients are unable to work. Anyone who has had experience in compensation and accident cases knows how widely different medical and surgical opinions on the same case may be, and how one set of eminent experts will swear that a certain man can do without pain or injury to health what other experts of equal eminence assert would be almost fatal. Knowing how readily certificates can be obtained for almost any purpose, and how quickly familiarity makes people callous to human and animal suffering, I fear there may be a vast amount of unnecessary pain caused in connection with vivisection.

Further, it is necessary to remember that the law is administered, as a rule, by an ordinary bench of magistrates. The following facts are taken from the headnote to the case of Dee *v.* Yorke (*English and Empire Digest*, Vol. 2, p. 292). The holder of a licence to perform experiments on living animals administered to an ass a drug which brings on general paralysis without pain. The animal, by the instructions of the vivisector, was kept in a field in dry and very hot weather. The animal lay on the ground and was unable to rise, being very weak and unable to protect itself against the attacks of the flies. The animal was painlessly destroyed when the experiment was completed. On the hearing of a summons against the licence-holder for causing unnecessary suffering to the animal by omitting to give it proper care and attention while it was in a suffering state the justices found that it did not suffer unnecessary pain while lying in the field, and they dismissed the summons. It was held by the High Court, on appeal, that the question was one of fact for the justices.

Cruelty to animals, so far as the criminal statistics go, is on the decrease. During the earlier years of this century the annual average of persons dealt with by the

courts was well over 13,000. Since the War there has been a steady decrease until in 1930 there were 3519 cases. It must be remembered, however, that a large proportion of cases of cruelty concern horses, which are now comparatively seldom used, whether in a fit or unfit state. According to the Royal Society for the Prevention of Cruelty to Animals, however, instances of cruelty are on the increase, although the actual prosecutions are decreasing. This, in turn, is probably due to the great increase in the number of dogs, which are often kept by persons who know little or nothing about how to keep them.

There are far more people who take active pleasure in cruelty than is generally supposed. The subject is a repulsive one, and because of its close connection with certain sexual instincts is seldom discussed. There is nothing mysterious about the sexual side of cruelty, nor need one drag in Freud. Any form of nervous excitement is likely to rouse sexual emotion, and this is subconsciously associated with pleasure. It is a pity that the sexual side of this pleasure in pain is not more generally recognised. If it were, we should have fewer people writing letters to the papers advocating flogging, the cat and the birch. For further information on this point see *The Lawbreaker*, by E. Roy Calvert and Theodora Calvert (Routledge, 7*s.* 6*d.*), p. 256. This perverted delight in cruel and disgusting things is referred to by Plato, and is an unpleasant feature of several well-known modern novels. Persons who take pleasure in pain are called sadists, a word derived from the Marquis de Sade, who wrote a silly and disgusting book on this subject. Nearly akin to the sadists are those who inflict painful punishments for the sense of power which it gives them. Persons of this type are not rare on the magisterial bench.

An immense amount of cruelty is, however, due to sheer callousness, partly due to lack of imagina-

tion, and partly to the ease with which human beings can accustom themselves to anything however it may at first repel them. The most tender-hearted girl pupil in a farm soon learns to kill fowls without a qualm, while the indifference of farmers and their labourers to the pain suffered by animals when undergoing "necessary" operations is horrifying. Sir Walter Scott was much in advance of his age on the question of cruelty, and occasionally found it necessary to apologise for his views. Two quotations from *Guy Mannering* illustrate this sufficiently.

The first relates to salmon spearing.

"Nor did he relish, though he concealed feelings which would not have been understood, being quite so near the agonies of the expiring salmon, as they lay flapping about in the boat, which they moistened with their blood."

The second concerns badger baiting.

"I hope our traveller will not sink in the reader's estimation, sportsman though he may be, when I inform him that on this last occasion, after young Pepper had lost a forefoot, and Mustard the second had been nearly throttled, he begged, as a particular and personal favour of Mr. Dinmont, that the poor badger, who had made so gallant a defence, should be permitted to retire to his earth without further molestation.

"The farmer, who would probably have treated this request with supreme contempt had it come from any other person, was contented, in Brown's case, to express the utter extremity of his wonder. 'Weel,' he said, 'that's queer aneugh! . . . and I'm sure I'm glad I can do onything to oblige you—but, Lord save us, to care about a brock!'"

The callous cruelty of the seventeenth and eighteenth centuries was terrible. It was thought a highly amusing touch to place half a dozen cats in a hollow effigy of the Pope, so that, when the figure was set

on fire, the cries of the burning animals should appear to come from its mouth. A book of rural sports recommends sawing off the lower jaw of a badger when baited by young dogs, so that it may not be able to injure and so discourage them. Gilbert White of Selborne records with apparent approval the action of a man who, having captured a sparrow-hawk,

"Clipped the hawk's wings, cut off his talons, and, fixing a cork on his bill, threw him down among the brood-hens."

The hens, of course, gradually pecked and tore the hawk to death, which the kindly naturalist found very entertaining.

On 15th May, 1933, a clergyman was fined £5 and ordered to pay £2 6s. costs for cruelty to two dogs by shooting at them with a shotgun. The reverend gentleman expressed himself as being much surprised at the dogs being seriously hurt.

CHAPTER X

GAMES AND SPORTS

THERE is an immense number of decided cases with regard to sports and games, illustrating, more or less clearly, the various principles applicable thereto. It is possible only to touch on a few points which may interest the ordinary citizen.

According to Halsbury's *Laws of England*, "at Common Law all games, except perhaps cock-fighting, are lawful", but there have been and are a large number of games which have by statute been declared unlawful. The exception as to cock-fighting is rather doubtful, and it would seem that it was probably rather the keeping of a cock-pit than cock-fighting itself which was unlawful.

The following games are now unlawful by statute: lotteries, ace of hearts, pharaoh (or faro), basset, hazard, passage, roulette (or roly-poly), and every game with dice except backgammon. Apparently every game of cards which is not a game of mere skill is also unlawful. It may be of interest to someone to know that the game of cloysh-cayls, which was unlawful for over 300 years, was made legal in 1845, and all games of mere skill are now lawful. The question of betting and gambling in connection with games is a matter apart from the game or sport itself. The High Court in 1852 solemnly decided that dominoes was not an unlawful game, and in 1748 it was held that cricket was an illegal game within the Gaming Act 1710.

The man or woman who takes part in a lawful

game or sport does so at his or her own risk, and has no remedy by action for damages in respect of injuries sustained, unless they are due to unfair or foul play. Interesting points might arise in the event of a person being injured by "body-line bowling" at cricket. If the game or sport is unlawful, other considerations arise. For instance, the fact that the person claiming damages was himself taking part in an illegal act would prevent him from recovering damages in respect of an injury arising out of it. This might have prevented Petersen from recovering damages in respect of injuries which he is alleged to have sustained in his fight with Doyle, since, for reasons to be given subsequently, boxing contests as at present conducted are usually illegal. Intentionally to cause serious injury or to commit an act which may cause serious injury, recklessly and with indifference to the consequences, even in a lawful game, is a crime.

Injury to persons not actually participating in a game or sport raises various questions which are not always easy to answer. It is important to consider whether the injured person is or is not a trespasser, and if so he cannot as a rule recover damages. But if, for instance, a trespasser on land where shooting was taking place were injured by reason of the careless shooting of the occupier of the land, an action for damages would probably lie (see Degg *v.* Midland Railway Co., *English and Empire Digest*, Vol. 36, p. 9). Cricket appears to be a specially privileged game and it has been held in a Scottish case that it is not negligent to play cricket near other premises whereby a person on such other premises was injured. This principle was followed in a recent County Court decision where a passer-by was injured by a cricket ball hit out of the ground. But the question of negligence depends upon the facts of the particular case.

The law with regard to boxing is known well enough to most of those intimately concerned with the control and management thereof, but the greater part of the press and the public generally seem to know nothing about it.

The law was clearly stated by Mr. Justice Hawkins in the case of R. *v.* Coney (see *English and Empire Digest*, Vol. 14, p. 84) as follows:

"Nothing can be clearer to my mind than that every fight in which the object and intention of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such a fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage. In each case the object is the same, and in each case some amount of personal injury to one or both of the combatants is a probable consequence, and, although a prize-fight may not commence in anger, it is unquestionably calculated to rouse the angry feelings of both before its conclusion. I have no doubt, then, that every such fight is illegal, and that the parties to it may be prosecuted for assaults upon each other. . . . The cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury to or to rouse angry passions in either, do not in the least militate against the view I have expressed, for such encounters are neither breaches of the peace, nor are they calculated to be productive thereof; but if, under colour of a friendly encounter, the parties enter upon it with, or in the course of it, form the intention to conquer each other by violence calculated to produce mischief, regardless whether hurt may be occasioned or not, as, for instance, if two men, pretending to engage in an amicable spar with gloves, really have for their object the intention to beat each other until one of them be exhausted

and subdued by force, and so engage in a conflict likely to end in a breach of the peace, each is liable to be prosecuted for an assault. Whether an encounter be of the character I have just referred to, or a mere friendly game, having no tendency, if fairly played, to produce any breach of the peace, is always a question for the jury in case of an indictment, or the magistrates in case of summary proceedings."

I have quoted this statement at length because it expresses what is and apparently always has been the law with regard to prize-fighting, whether with bare fists, gloves or weapons of any kind. "Up-and-down" fighting, a vicious form of contest apparently on the lines of the Greek pancratium or rough-and-tumble fighting, was held more than a hundred years ago to be necessarily dangerous to life, so that should death ensue in such a struggle the charge would be not manslaughter but murder. If "all in" wrestling were what it professes to be, and not, as it usually is, a fake, its professors would do well to consider this decision (see Thorpe's case (1829), *English and Empire Digest*, Vol. 14, p. 783).

There was a decision in 1731 that prize-fighting was illegal, and even in 1694 its illegality was decided against the principle of *volenti non fit injuria*. Indeed so long ago as the reign of Henry VII it was held that tournaments, which were of course prize-fights, were illegal, unless at the commandment of the king, and in the time of Henry VIII the judges are said to have held that even the King's commandment would not justify or excuse a person who killed another in a tournament, because the commandment itself was illegal (see the judgment of Mr. Justice Stephen in R. *v.* Coney). The popular belief that prize-fighting was formerly not illegal is mistaken, but owing to the difficulty of enforcing laws which run counter to public opinion it was carried on

pretty openly until after the Sayers-Heenan fight in 1860, after which it rapidly declined. Large numbers of fights were, however, prevented by the magistrates, and it was said in 1825 in the case of R. *v.* Bellingham (*English and Empire Digest*, Vol. 15, p. 643) that all persons present at a prize-fight were guilty of an offence. This point was discussed as long ago as 1602 and the view expressed in R. *v.* Bellingham was followed in R. *v.* Perkins and R. *v.* Murphy, although dissented from in R. *v.* Coney, where it was laid down that mere attendance at a prize-fight does not in itself involve liability as an aider and abettor of the principals. R. *v.* Coney should be a comfort to the crowds in the Albert Hall and in Olympia, but they must bear in mind that their presence may need explanation.

It is hard to say to what extent prize-fighting was countenanced by public opinion. There can be no doubt that it was patronised, especially in the first quarter of the nineteenth century, by many persons of high standing, and by immense numbers. As George Borrow says in *Lavengro*, published in 1851:

"I have known the time when a pugilistic encounter between two noted champions was almost considered in the light of a national affair; when tens of thousands of individuals, high and low, meditated and brooded upon it, the first thing in the morning and the last thing at night, until the great event was decided."

Borrow, however, in *Zincali*, written about 1840, speaks of "those disgraceful and brutalising exhibitions called pugilistic combats". He also says: "When a boy of fourteen I was present at a prize-fight: why should I hide the truth?" It is probable that the general attitude was much the same as that which at present exists towards street betting. However this may have been, in the 'sixties and 'seventies of the last century the law was more

strictly enforced, and by the middle 'eighties bare-knuckle pugilism was for practical purposes extinct, except as a hole-and-corner business on a similar footing to present-day cock-fighting. Prize-fighting was at one time so far recognised that it was the practice of railway companies to run special trains for big fights, stopping them wherever required by the promoters and issuing tickets " There and Back ". This was put an end to by the Regulation of Railways Act of 1868, which imposed penalties having a minimum of £200 and a maximum of £500 on railway companies knowingly providing special trains for conveying parties to a prize-fight, or stopping an ordinary train to accommodate parties for such purpose otherwise than at an ordinary station. These penalties were recoverable summarily, and half went to the informer.

About the time of the suppression of bare-knuckle prize-fighting the practice of glove-fighting was introduced. The Queensberry Rules, framed to govern such contests and called after the Marquis of Queensberry, were drawn up in 1867. It is not generally realised that the Queensberry Rules for contests were for fights to a finish, but gloves were used, wrestling prohibited, and the rounds made of a definite duration of three or two minutes instead of ending when a man went down. The 10-secs. knock-out was introduced, and the interval between rounds was made a full minute, instead of half a minute, as in the old style. It was ruled in the case of R. *v.* Orton, in 1878, that the fact that gloves were used did not in itself prevent a contest from being a prize-fight. Glove-fights to a finish being thus illegal, little public interest was taken until it was discovered that the rule which made a man the loser who did not rise within 10 secs. from his being knocked down could be used to make a legal contest of skill into a real fight. John L. Sullivan was the first well-known

boxer to exploit the possibilities of the knock-out blow with the glove. A man who falls exhausted as the result of a series of blows, and fails to rise within 10 seconds, is just as much knocked out as if by a single blow on the point of the jaw or in the solar plexus, the old "mark". A boxer who retires is also said to suffer a technical knock-out.

The National Sporting Club Rules, under which, or some modification whereof, boxing contests are now conducted, provide for a limited number of rounds, not exceeding fifteen, and for a decision in favour of the boxer who gets the greater number of points. If, however, either man is "down", he must get up unaided within 10 seconds, otherwise he gets no points for that round and the contest ends. Points are to be given for direct clean hits with the knuckle part of the glove on the front or sides of the head or body above the belt, and for defence. The referee is to give a maximum number of five points in each round to the better man, and a proportionate number to the other, or, when equal, the maximum to both.

Theoretically, it would be possible for a man to be knocked out and yet win. It is obvious that if the rules really mean what they say, any boxer who has a lead of over five points has only to be knocked out to win the contest. Notoriously, however, even should a boxer win fourteen rounds out of the fifteen, leaving his opponent pointless, if he were to be knocked out in the fifteenth he would be adjudged the loser. I have seen a fight won in, speaking from memory, the eighth or ninth round, by a boxer who hit his opponent three times only during the contest. In the fight between Jim Driscoll and Ledoux at the N.S.C. in 1919, Driscoll won every round up to the fifteenth, but was forced to retire in the sixteenth round. According to Mr. Corri, "up to the tenth round Driscoll scored practically every possible

point" (*Fifty Years in the Ring*, by 'Gene Corri, p. 116), and he adds (on p. 118) that "for fourteen rounds he had taken nearly every point". Under the rules, therefore, he must have won, but as everybody knows, he didn't. Again, Mr. Corri, describing the fight between Bombardier Wells and Moran, in which the former was knocked out in the tenth round, says of Wells: "He had been beaten, though he had won practically every point" (p. 134). It cannot be suggested that Mr. Corri was either ignorant of the rules or a poor judge of boxing. Anyone who wishes to know whether glove contests under National Sporting Clubs are contests of skill or fights should read Mr. Corri's excellent account of the three meetings between Johnny Basham and Kid Lewis, in which Mr. Corri incidentally remarks, "and so for a second time the fighter beat the boxer". The reader will also have no difficulty in deciding as to whether in these contests it was "the object and intention of each of the combatants to subdue the other by violent blows", to use the words of Mr. Justice Hawkins in R. *v.* Coney. Sporting journalists always talk about fights, and "killer-instinct" and so forth, and rebuke British boxers for relying upon skill instead of hard hitting, but it may be said that they are always sensational, so I have thought it better to quote the considered statements of Mr. Eugene Corri. For those who have actually seen professional boxing matches it is unnecessary to quote anything. They have seen for themselves that these contests are fights within the meaning of the words of Mr. Justice Hawkins.

Important contests are, as a rule, won by a knock-out and not on points. Out of eleven holders of the World's Heavyweight Championship two only, Dempsey and Schmeling, lost their title on points, while two retired unbeaten and seven were knocked out. Carpentier's contests in this country provide

a good example, for out of his six fights as a heavy-weight he won five by a knock-out, four of these in the first round. His other fight he won on a foul. The point as to illegality was actually tried before the Birmingham Stipendiary in November 1911, when Driscoll and Moran, who had agreed to box twenty rounds under National Sporting Club rules for a purse of £2600 were bound over to keep the peace. Sir Edward Marshall-Hall was for the defence, and the point was fully argued. The Stipendiary agreed to state a case, but the matter was taken no further. Before the War there was not much disagreement as to the illegality of glove-fights, but since then the exalted patronage which boxing has received has caused the point to be forgotten. It will probably be raised in the future, especially should there be any repetition of the Doyle-Petersen fiasco, and should the Boxing Board of Control dissolve or be superseded.

I have dealt at length with the legality or otherwise of boxing, for there is a great deal of misunderstanding with regard to the point, and it forms an interesting example of what happens when laws are not in accordance with public opinion. Our betting laws provide another example. I may perhaps add that I cannot see any strong objection to legalising glove-fights, or even bare-knuckle fights, providing the latter are not fought to a finish and are conducted in private. My father and grandfather often fought without gloves, and I have once or twice done the same myself. In my experience it is the spectators who make fighting an objectionable thing.

A law which operates harshly against the poorer classes is Sec. 3 of the Vagrancy Act Amendment Act 1873. To understand the position it is necessary to quote the section in full.

"Every person playing, or betting by way of wagering or gaming, in any street, road, highway,

or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming at any game or pretended game of chance, to be deemed a rogue and vagabond, and as such may be convicted and punished under the Vagrancy Act 1824 or in the discretion of the justice or justices, in lieu of such punishment by a penalty for the first offence not exceeding 40s. and for any second or subsequent offence not exceeding £5."

Under this section a railway carriage in transit has been held to be a public place, and the players of an ordinary game of cards in the train for money, however small the stakes, may be punished as rogues and vagabonds. The greatest hardship under this section is the frequent prosecution of men, usually unemployed, for gaming with cards in "an open place to which the public are permitted to have access". Many a time I have been in court when men, often ex-service men, have been prosecuted for playing cards for a few pence on some disused slag-heap or canal bank. Often those convicted were mere onlookers who, knowing their innocence, did not bolt quickly enough. Whatever the men may say, the police evidence is in my experience always accepted. A week or two before this was written I was in court when six men were brought up on this charge. They protested their innocence, and the only evidence against them was that of one policeman. They were asked if they had any witnesses, but not whether they themselves wished to give evidence, and on their saying they had no witnesses they were all convicted. The fines usually range from 2s. 6d. to 10s., but these are serious amounts to men getting 15s. 3d. a week unemployment pay. It is sometimes argued that these card players are often offensive to passers-by

by their use of obscene language, and that this section provides a convenient remedy. This is typical of the way in which the law is often administered in connection with the working classes. If a person uses obscene language by all means deal with him for that offence, but it is grossly unfair to punish a man for playing cards because someone—probably someone else—may have used filthy language. In fact, this is a mere excuse for that love of interfering with the working classes and their amusements which is an evil inheritance from the past. Time after time I have heard a constable, giving evidence for the prosecution, speak of the difficulty he had in getting near the players, although in plain clothes, because they had sentries out to prevent anyone approaching unawares! Any attempt at a defence in these prosecutions is usually resented by the bench as (*a*) a waste of time—which it usually is—and (*b*) a reflection on the police, and their resentment is marked by an increased fine.

Cheating at games is an offence under the Gaming Act 1845, Sec. 17, apart from any question under the general law as to false pretences or conspiracy. Shortly, any person who by "fraud or unlawful device or ill-practice in playing at or with cards, dice, tables, or other game", or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of the players, or "in wagering on the event of any game, sport, pastime, or exercise", wins any sum of money or valuable thing is to be deemed guilty of obtaining such money or valuable thing by false pretences with intent to cheat and defraud.

There have been some amusing cases under this section. In prosecutions under this section it must be proved that the cheating was done in the course of the game itself, and not in anything done beforehand. Rather a neat trick was played by the two

prisoners in the case of R. *v.* Hudson (see *English and Empire Digest*, Vol. 15, p. 1010). Three men, two of them acting in concert, were in a public-house. One of the two put a pen-case on the table and left the room. The other prisoner took a pen out of the case and substituted a pin, and thus got the prosecutor to bet the first man on his return 50s. that there wasn't a pen in the case. The 50s. was duly staked, but on the pen-case being turned up another pen fell out, and the prosecutor lost his bet. It was held, in the elegant phraseology of the head-note, that the evidence supported a conviction upon a count charging the prisoners with " conspiring by divers false pretences and fraudulent devices to cheat prosecutor of his money ", although it appeared that he had the intention of cheating one of the prisoners if he could. But it seems that the facts did not amount to the offence of cheating at play within the before-mentioned Sec. 17, although the point was not actually decided.

In the case of R. *v.* O'Connor, two confederates, O'Connor and Brown, tossed a coin on the basis of five tosses, the last of the five to decide. Brown won the first four tosses, and then the prosecutor was induced to stake his watch and chain against O'Connor £5 that Brown would win the fifth toss. Needless to say, Brown didn't, and O'Connor picked up the watch and chain. It was held by the High Court on appeal that tossing a coin was a " sport, pastime, or exercise " if not a game, within the meaning of Sec. 17. The argument of counsel for the prisoner was that tossing with coins was not mentioned in the statute, nor was it *ejusdem generis* with the words " cards, dice, tables, or other game ". He was not encouraged by the judges, who put various points against his argument. Counsel, however, appears to have scored at the finish, when he evidently thought it didn't matter what he said. Mr. Justice Stephen having remarked,

"The words of the statute are 'game, sport, pastime, or exercise.' Surely this was a pastime?" Counsel replied that this was not a game, sport, pastime, or exercise within the meaning of the statute. Lord Coleridge, the Lord Chief Justice, asked, "What do you call it, then, if two persons spent an hour in pitch and toss?" To which Counsel replied, "Waste of time."

Hunting of all kinds, cross-country running and "hiking" are all sports which often raise the question of trespass to land.

In the first place it is necessary to distinguish between the civil and criminal position. Every unlawful entry by one person upon another's land is a trespass for which a civil action lies, even though no damage is done. But trespass upon land is not in itself a crime, and the notices saying "Trespassers will be prosecuted" have been correctly described as wooden liars. This is, however, mere theory. In practice what happens is that the trespasser is prosecuted for wilful damage to property. The law on this subject is not easy to gather from the reported decisions. Take the commonest case, damage to grass. The High Court held, in the case of Eley *v.* Lytle (see *English and Empire Digest*, Vol. 15, p. 1034), that persons playing football in an enclosed field and continuing to play although told to leave could not be convicted of unlawfully and maliciously damaging the grass. In this case the High Court held that there was no intent to destroy and no damage, and ignored the finding of damage by the justices. In a later case, however, a trespasser who, after a request not to do so, walked across a field of long grass, doing damage to the value of 6d., was held to have been rightly convicted (see Gayford *v.* Chouler, *English and Empire Digest*, Vol. 15, p. 1040). The law appears to be that there must be real and appreciable damage wilfully done for a person to be con-

victed, but the question whether or not this has been proved would seem to be one of fact for the justices. Eley *v.* Lytle appears merely to show that damage must be proved and not assumed. One day in the summer of 1933 I was in court when two boys were convicted of committing wilful damage to turf by playing football. The farmer who gave evidence said there was hardly a blade of grass in the field, owing to football playing by others and the hot summer, but the justices convicted without hesitation! In agricultural districts the benches almost always convict on the slightest evidence of damage. To appeal would be costly and in most cases useless. There may, of course, be damage other than to grass, for instance to fences. Stone's *Justices Manual* (1933 edition, p. 1366) says: "It seems clear that this statute was not intended to give a summary remedy for an alleged trespass, and justices must inquire carefully whether actual damage was committed." This recommendation is usually ignored. The penalties imposed may be, even where the damage does not exceed £5, imprisonment for two months or a fine not exceeding £5, or, if the damage exceeds £5, three months' imprisonment or a fine of £20, together with in either case reasonable compensation for the damage. A genuine claim of right will oust the jurisdiction of the justices in these prosecutions for wilful damage.

In addition to the risk of a prosecution for wilful damage a trespasser runs a risk of being accused of stealing mushrooms. In some districts farmers put down some mushroom spawn, not so much with a view to growing mushrooms, but to protect natural mushrooms by giving substance to a claim that they are cultivated and therefore the subject of larceny. There have been numerous convictions for stealing mushrooms.

Apart from criminal prosecution a trespasser runs a risk of civil action, as already mentioned. Hunt-

ing does not provide any excuse for trespassing upon land without the consent, express or implied, of the owner, although in a case decided in 1786 it was held that a person might justify trespass in following a fox with hounds over the land of another, if he did no more than was necessary to kill the fox (see Paul *v.* Summerhayes, *English and Empire Digest*, Vol. 43, p. 411).

A person may be entitled to enter upon another person's property in a manner which would otherwise constitute a trespass, if his action is reasonably necessary for the preservation of the property of the person entering, or to save life, provided he acts reasonably. For instance, it was said in 1800 that a private person might break and enter a house to prevent a man from murdering his wife (see Handcock *v.* Baker, *English and Empire Digest*, Vol. 43, p. 413). The fact that this point was actually thought of and discussed shows the importance which in this country has always been attached to property. It was held in a case decided in 1537 that a man might justify pulling down a house on fire for the safety of adjoining houses, and this remains good law.

In 1678 it was held that "if a highway be foundrous" a passenger might go over the adjoining land, doing as little harm as possible. It is said that this right of deviation, as it was called, is the reason why the hedges adjoining old roads are often set back a considerable distance from the metalled roadway, leaving wide strips of turf on either side.

There is a good deal of misapprehension as to public rights on the highway. Actually there is only a right of passage. The *Year Book* of 1468 states: "In the King's Highway, the King has only the right of passage for him and his people, but the freehold and all the profits such as trees are in the lord of the soil." Thus in the well-known case of Harrison *v.* Duke of Rutland in 1893 (see *English*

and Empire Digest, Vol. 43, p. 405) the plaintiff, in order to interfere with the Duke's shooting, went on a certain highway which intersected moors belonging to the Duke. The Duke's keepers, in order to prevent the plaintiff from interfering with the shooting which was then going on, seized him and held him down until the shooting was over. The Court of Appeal held that the plaintiff was a trespasser interfering with the legal rights of the Duke, and the assault was justified. This case, though doubtless rightly decided on the particular facts, has encouraged landowners and their keepers to adopt an aggressive attitude towards persons legitimately using moorland roads and rights of way. A person is entitled to use the highway in a reasonable manner, for instance, by sitting down at the side of the road to rest, and the High Court refused an injunction to prevent a man from catching moths on the highway.

Commons are of some importance in connection with the question of trespass. A common is land over which rights of common are exercised. The persons who exercise the rights of common are not the owners of the land, which is almost always open and uncultivated. Strictly speaking, prior to 1926 no one, except the Lord of the Manor and the commoners, had the right to use a common in any way, but as a rule everyone else who cared to do so went on the commons just as they pleased, although at law they were trespassers. Under the Law of Property Act 1925, however, the public is given the right of access for air and exercise to all metropolitan commons, all commons wholly or partly within a borough or urban district, and possibly to all other commons. These rights are subject to conditions which may be imposed by the owner of the common with the approval of the Minister of Agriculture, and it is expressly provided that the public are given no right to draw or drive upon a common a carriage,

cart, caravan, truck or other vehicle, or to camp, or to light any fire, under a penalty of 40s.

The foreshore, lying between high-water mark of ordinary tides and low-water mark prima facie belongs to the Crown. In many places, however, it belongs to some local landowner or authority, and it is unsafe to assume it to be Crown property if challenged as a trespasser.

Trespassers may be forcibly turned out by the person in possession of the land or anyone acting under his authority. If the trespasser enters or behaves with force and violence he may be forcibly ejected without first being asked to leave, but if he behaves peaceably he must be requested to leave before force is used. A landowner has no right to seize and detain a trespasser who is going away, in order to compel him to give his address. Only such force as is reasonably necessary may be used to eject a trespasser. It is advisable to leave at once when requested without giving any excuse for the use of force. Few people can avoid struggling when hands are laid on them, and a trespasser is in the doubly difficult position of being liable to be prosecuted for assault if he resists successfully, and of having practically no redress if excessive force is used.

It is a common practice of farmers in districts where trespass is common to let a vicious dog run loose at likely times, or put a savage bull in the fields. A trespasser injured by such animals has usually no remedy, and he is also without remedy if he falls into a pit or quarry or suffers injury from a falling tree, or in any way other than from something done either intentionally or with reckless disregard of his presence. Man-traps and spring-guns, except in dwelling-houses, are now, however, illegal.

One other point in connection with trespass is worth considering. There is not much to be said in practice for the advice, attributed to various emi-

nent judges, that the right course for a trespasser to adopt is to proffer 6d. as compensation for possible damage. There does not seem to be any authority for the proposition that tender of amends, unless under certain statutory provisions dealing with exceptional cases such as involuntary trespass or under the Lands Clauses Acts, is a defence to an action for an intentional trespass. In Walgrace's case, about 1590, it was held that a plea of tender of amends was not good where the trespass was voluntary, and the headnote to Cubitt *v.* Harrison, decided in 1601, is "Tender no plea in trespass" (see *English and Empire Digest*, Vol. 43, p. 414). There is the further difficulty that in case of a criminal prosecution for wilful damage a tender of amends would almost certainly be taken as an admission that damage had been done, while the offer of, say, a shilling to a farmer or a keeper would probably be taken in the first instance as an insult and in the second as an inadequate bribe.

For practical purposes the best advice to a trespasser who sees anyone approaching with apparent hostile intent is at once to approach the oncomer and ask the nearest way to a road or any other place he can think of. Everyone likes to be asked for advice, and usually a friendly talk results. It should be remembered that farmers often suffer severely from the idiotic acts of trespassers, who leave gates open, frighten stock, damage hedges, fences, and growing crops, and not infrequently start fires. The extreme insistence on "the rights of property" is, however, leading to resentment on the part of a large section of the public. Mr. Mais has, in his wireless talks, referred to this matter in connection with sporting rights over the moors on remote hillsides, and there has been much ill-feeling in connection with the rights claimed, rightly or wrongly, by local landowners in many parts of the country both

over the foreshore and waste land, such as sandhills adjoining thereto, over which the public has trespassed without interference for many years. It must be remembered that trespass cannot confer rights. User must be as of right to obtain a right of way.

CHAPTER XI

MOTORISTS

Most motorists have a general knowledge of the penal clauses under the Road Traffic Act, such as those relating to dangerous driving and driving without due care and attention. For practical purposes the motorist need not concern himself with the technicalities of the law. All points of this kind will be dealt with by his legal advisers. In case of any accident the insurance company should immediately be notified, and the motorist will usually be told the name of the solicitor who will deal with his case. The principal insurance companies usually employ their own solicitors, and it is not as a rule advisable for a motorist to attempt to insist on employing his own. Not only are the insurance companies' solicitors specialists in motor cases, but they have a wide experience in the various courts. Should it be left to the motorist to engage a solicitor he will do well to engage the best local advocate, and not take his own solicitor with him. The local man knows his bench, and the practice of the court, which is an immense advantage. Apart from the expense of taking a solicitor away from his own town for a great part of a day, there are many courts in which the presence of a stranger is almost openly resented and the client has often to pay for this.

The peculiarities of many of the smaller provincial courts must be seen to be believed, and the Clerk or Chairman usually has his own prejudices. In one court the clerk holds that no car should enter at all

upon cross-roads or a main road from a side road until the driver has seen that the way is clear in both directions. I have myself pointed out in this court that the driver does not sit on the bonnet of his car, but without avail. The clerk's views have, I understand, at last been modified by a motoring friend who took him home one wet day. On arriving at the first cross-road the car stopped short and the clerk was requested to hop out and have a look both ways. Reluctantly he did so, and resuming his seat reported all clear. "Well, get out and have another look," said the driver, "something may have come on the road since you were there." And he made the unfortunate clerk stand on the cross-road in the rain and signal him across. Before the next cross-road was reached the clerk was convinced of the error of his ways.

So far as civil claims for damages are concerned the motorist has usually little to worry about, except to be careful to see that his insurance policy is kept up and that its conditions, especially with regard to giving notice of accidents, are observed. But as a large proportion of reported accidents, especially collisions, lead to prosecutions of one or both parties, involved drivers have plenty to consider. The first point is that in case of an accident whereby damage or injury is caused to any person, vehicle (including his own) or animal (horse, cattle, mule, sheep, pig, goat or dog), the driver must stop at once. He must further, if required so to do by any person having reasonable ground for so requiring, give his name and address and the name and address of the owner and the identification marks of the vehicle. Remember that he must do this if reasonably required. If for any reason this is not done the driver must report the accident at a police station or to a constable as soon as reasonably practicable and in any case within twenty-four hours (Road Traffic Act 1930, Sec. 22). The

maximum punishment for an offence under this section is a fine of £20, or for a second or subsequent conviction, a fine of £50 or three months' imprisonment.

Assume that a collision between two cars has occurred. Dealing with the injured, if any, must of course be the first consideration. So far as the legal possibilities are concerned, the driver and his passengers must remember throughout not to speak without thinking. When in doubt, say as little as possible. Don't make any admissions, whether positive or by silent acceptance, but don't argue with the other side. Get the names and addresses of witnesses, if any, and give yours. Then get the exact positions of the cars on the road, with measurements, and particulars of any skid or brake-marks.

The question of calling in the police is often a difficult one. All motoring cases come before the magistrates, although in cases of dangerous driving or driving while under the influence of drink or drugs the accused has the right to elect to be tried by a jury at Quarter Sessions. The magistrates, however, decide whether or not the accused is to be committed for trial. During the week in which this was written I was in a certain court where a motorist was charged with an offence of which it was reasonably clear he was not guilty. He was ordered to pay the costs. I asked one of the sitting magistrates the reason for their decision, and was told that his colleagues agreed that the man had committed no offence, but made him pay the costs lest the police should think they were not being supported. I have known almost innumerable similar cases, the necessity of supporting the police being often announced in open court. It is thus obvious that there is a considerable risk in calling in the police. The objection to not doing so is, in the first place, that there is no third party to take the necessary measurements, and secondly, that if one side

calls in or notifies the police and the other does not, the one who does sometimes gains an advantage. There was, however, a case in which I was concerned not long ago in which matters turned out otherwise. A collision had occurred in which neither car was much damaged. My client suggested that the matter should be left to the insurance companies concerned to settle, but the other driver, full of righteous indignation and conscious innocence, insisted on sending for the police. They came, both parties were summoned, and the injured innocent was fined £10, the other man getting off with £3. I have rarely seen a man so annoyed as the gentleman who sent for the police. He had, in my opinion, good reason to be dissatisfied with the court's decision, but he had only himself to thank for it.

On the whole, it is better not to send for the police, however certain you may be that you are in the right, provided there is a reasonable probability that the other side will not do so. As a rule, when there is a collision, the police take out summonses against both parties. They are thus reasonably certain of getting the costs paid by one or other defendant, and it is very rarely indeed that costs are given against the police when a charge is dismissed. Magistrates being what they are, it frequently happens that the innocent party is convicted and the guilty goes free.

When the measurements are taken, be careful to make, and keep, a note of them, and be sure that you do not agree to anything such as " point of impact " without being quite certain as to what is meant by it. The question as to whether or not it is wise to " make a statement " to the police is a difficult one. There is no obligation to do so. For most people the better course is to decline. Prosecuting solicitors often make unfair use of such statements, and suggest that any point which may have been omitted is a subsequent invention. Some courts deal with statements

as if they were the carefully drawn pleadings in an action, instead of the confused and partial recollection of a layman, usually given when suffering, at the least, from nervousness. At one time, in some districts, great pressure was put upon motorists involved in accidents to induce them to make statements. In one case within my experience a driver was visited by the police at his place of employment and told that he must go to a police station a few miles away and make a statement. He consulted me and I advised him that he need not do so. He was again visited by a constable at his home, and told that he would have to go and make a statement, although he quoted my advice on the matter. It was not until I had telephoned to the police station concerned and made a protest that the matter was dropped. A prosecution differs from a civil action in that contributory negligence is not a defence. However much the other party may have been at fault does not excuse a defendant in a criminal prosecution. He himself must have been guiltless of the offence, and, in most " Police Courts ", he will be required to prove himself so, notwithstanding that the law, in theory, presumes innocence until guilt is proved.

The question of insurance is of the most vital importance. The law with regard to insurance is difficult and technical. The public are often warned to read proposal forms carefully before signing them, and to study their policies after receiving them. This is good advice, for doing so will serve as a reminder of duties and liabilities, but it is hopeless to expect that it will be much help to a layman in estimating the effect of a policy. By far the best thing to do is to insure with a good office, and tell the agent what you want. Insurance offices of good standing value their reputation very highly, and are exceedingly fair, and even generous, in their dealings. It is probable that very few claims are made under motor insurance

policies which could not be resisted by the companies concerned with good chances of success.

Some people, usually persons with a high estimate of their own skill as drivers, think they are sufficiently protected by the third party insurances which all motorists have to take out. As the law stands they are mistaken. If their own company is a good one they will be completely indemnified against claims made against them, but they may be in a difficult position in recovering damages, if the other party to the accident, as often happens, is a man of straw. Although every motorist has to insure against third party risks, a third party who has suffered damage is bound by the conditions of the policy, and may be unable to recover against the insurance company because of some misstatement by the person who has caused the damage. There can be little doubt that third party risk policies ought to be absolute in favour of a third party, but at present they are not. A full discussion of this point in connection with Third Party Insurance policies will be found in *Law Notes* for January 1933 on p. 14.

A motorist will do well to leave all legal matters to his legal adviser or the solicitor appointed by his insurance office. He may bear in mind, however, that for the fee of one guinea allowed by some corporations it is quite impossible that he can be properly defended. By grouping several cases together a reasonably good advocate may be obtained, but all he can do is to test the case for the prosecution, and that not adequately. Getting up the case for the defence is a troublesome job, involving interviews with witnesses, and an inspection of the scene of the accident. It cannot be done for a guinea.

A motorist involved in an accident should make a note as to whether he was warned " at the time the offence was committed " that the question of prosecuting him would be considered. If he was not so

warned, then he is safe from conviction for excessive speed, dangerous or careless driving after fourteen days, unless in the meantime either a summons is served on him or notice of the intended prosecution is served on or posted to him or the registered owner of the car. The onus is on the defence to prove that these requirements have not been complied with, and the prosecution are excused if neither the name nor address of the driver or the registered owner could with reasonable diligence have been obtained in time, or the accused by his own conduct contributed to the failure (Road Traffic Act 1930, Sec. 21). There is room for argument as to the meaning of " at the time ". I have known magistrates hold that a warning given an hour later at the house of the accused nearly half a mile from the scene of the offence was sufficient. In this case the warning was actually given on the following day, as the offence occurred at 11.30 p.m. Counsel engaged in the case considered that the bench was wrong, but that there was not sufficient weight in the point for an appeal to be worth while.

In connection with motoring and the use of the roads there remains a point which has in the past in my experience several times caused difficulty in country courts. The Highway Code issued by the Ministry of Transport in pursuance of Sec. 45 of the Road Traffic Act says :

" *Led Animals.* It is the usual practice when leading an animal to keep to the right so as to face oncoming traffic.

" *Ridden Animals.* Observe the rule of the road for vehicles unless leading another animal (see above)."

Failure to observe the Highway Code does not of itself render a person liable to criminal proceedings of any kind, but any such failure may in any proceedings be relied upon by any party to the proceedings as tending to establish or negative any liability which

is in question in those proceedings (see Road Traffic Act, Sec. 45 (4)).

But by Sec. 78 of the Highway Act of 1835 it is enacted that—

"If the driver . . . of any horses, mules, or other beasts of draught or burden, meeting any other waggon, cart or other carriage, or horses, mules or other beasts of burden, shall not keep his . . . horses, mules or other beasts of burden on the left or near side of the road", . . . "or shall not keep his . . . horses, mules or other beasts of burden on the left or near side of the road for the purpose of allowing such passage" (i.e. the free passage of persons, waggons, horses, etc.), he shall be liable to be convicted of an offence.

By Sec. 45 of the Road Traffic Act the Minister of Transport is directed to—

"Prepare a code comprising such directions as appear to him to be proper for the guidance of persons using roads."

Can it be contended that this gave him power to repeal Sec. 78 of the Highway Act 1835? If so, in view of the comprehensive words of Sec. 45 just quoted, the Minister might do some very remarkable things, for little attention is paid by the Houses of Parliament to regulations laid before them. It is fairly clear that Parliament did not intend to confer such a power, for the Road Traffic Act expressly repeals Sec. 76 of the Highways Act 1835 so far as it relates to motor-vehicles and trailers. Everyone is presumed to know the law, but here there seems to be a choice between law and regulation. Shortly before the Road Traffic Act there were two or three cases before local justices in which it was unsuccessfully pleaded that universal custom had rendered the before-mentioned provisions of the Highway Act 1835 as obsolete as the statutes relating to church-going. These were instances where grooms with led horses were convicted, notwithstand-

ing the local influence of the Hunt. Men in charge of strings of Welsh ponies have also been convicted.

Ill manners on the road are unduly prevalent, and it is unfortunate that prosecutions are not occasionally instituted for such matters as accelerating when being passed, after proper notice, by another car. It is certainly driving " without reasonable consideration for other persons using the road " to accelerate under such circumstances, and is a thing likely to cause accident.

Should a summons actually be issued it is well to be at the court about a quarter of an hour before the time named thereon. This allows time for a final word with your advocate if you have previously met him, and an interview if you have not. In motoring cases it is especially important to keep on good terms with the chairman or any other magistrate who shows any sign of taking the defendant's part. A few weeks before this was written I was defending a motorist who was an engineer of high qualifications, but with no experience of magistrates. The chairman of the bench, a gentleman whose high social standing was only equalled by his extreme ignorance of mechanics, asked some questions of the accused, obviously with a desire to help him. For a minute or two the motorist bore with him. Then, no longer able to contain himself, with an angry snort he held up to derision the imbecility of the question asked him. The offended magistrate subsided. I made such use as I could, in addressing the bench, of what I ventured to describe as the very interesting suggestions made by the chairman, but I need hardly say my client was convicted and heavily fined.

Everyone is agreed that the present state of things on the roads is appalling. To those who notice the reckless and incompetent driving which takes place, and the carelessness of pedestrians, the marvel is that there are not more accidents. Speed limits in urban

districts, regulations for pedestrians, tests for drivers, and the American system of compelling a dead stop, not merely slowing down, by a motorist before emerging from a minor into a major road, would do much to reduce the number of accidents. The greatest factor making for improvement, however, will be the development of a road sense by motorists and pedestrians. So far as pedestrians are concerned, the greater number of casualties occur among the very young and the old. It has been suggested, by Lord Buckmaster among others, that if coroners' juries did their duty and more often found verdicts of manslaughter it would have a good effect. People who talk like this can have had little practical experience of what a farce the ordinary coroner's inquest is. There are no rules of evidence, the coroner himself has often no sort of legal training, and when a verdict of manslaughter is returned it commonly happens that the subsequent proceedings show that it was a mistaken one. With regard to the magistrates in the "Police Courts" it is true that the penalties they impose are usually too light for the offence recorded. But the average bench is frequently uncertain as to whether they have done right in convicting, and imposes a light penalty in case they have been wrong. This is notoriously the position. I have elsewhere quoted an instance which occurred less than a year ago, in which, for precisely similar offences, one man was fined 40s. and the other got three months. I had defended both, and on subsequently meeting the chairman of the bench I asked the reason for the difference. "Oh," said the magistrate, "the evidence was much stronger in the one case than in the other."

Motoring cases are difficult to decide rightly. The evidence of independent eye-witnesses is seldom available. Even when available it is usually unreliable, for in motoring cases, above all others, witnesses tend to give in evidence not what they actually saw, but

what they persuade themselves, or are persuaded, they saw. They reconstruct what they think must have happened. It is obviously impossible to watch more than one moving object at a time, and yet the right decision of motoring cases usually depends on accurate evidence as to the relative positions from time to time of rapidly moving objects. The evidence of witnesses is taken down, as a rule, by some zealous young constable, naturally desirous of doing his best to obtain a conviction. The deplorable practice of allowing police officers to conduct prosecutions makes matters worse, as the constable who takes the statement is anxious not to let his superiors down. I am aware that theoretically the statements taken are considered before a prosecution is decided upon. After this was written I received an interesting confirmation in a letter from a friend of mine, in which the writer says :

" Some time ago I saw a child run over by a motor and there was a police prosecution ; they called me as an eye-witness, and I did not enjoy myself because the police tried to convince me that I had registered the position of the motor after the accident, and I had not. I had only registered the position of the child. Do the police always bully like that ? I felt I was either mentally deficient or trying to commit perjury, but I did not alter my tale. I think the methods of the police are psychologically sound from their own point of view, because I was much interested in the slight but valuable alterations which appeared in the story of the other witness (a maid with the child) after interviews with the police."

In the *Birmingham Mail* of 6th February, 1934, appeared a letter from a motorist who was stopped by a cyclist, who accused the motorist of having knocked a boy down. The cyclist said that he and two other cyclists had seen this done. On further investigation it was found that the boy had fallen from

the luggage grid, upon which he had been riding. Fortunately the boy was not seriously injured. Had he been killed it is obvious that the motorist would have been in a serious position. To quote from the letter:

"With three grown-up cyclists' evidence—all sure that they had seen me knock him down—I am afraid that my word wouldn't have been much good."

So far as the evidence of the parties to a collision or other road accident is concerned it is generally clear enough that the accident itself was due to lack of observation or carelessness on the part of one or both of them so that it must be discounted apart from its natural bias. In the majority of cases, therefore, the decision of the justices has to be made on the circumstantial evidence provided by marks on the road, the condition of the cars, and the efficiency or otherwise of the brakes and lights. The correctness or otherwise of the inferences drawn from evidence of this kind depends upon the degree of technical knowledge of motor-cars, mechanics and road surfaces possessed by the magistrates who hear the case. As a rule they have none at all. If motoring offences are considered in isolation, the best course would be to hold separate courts for motorists, presided over by specially qualified magistrates or assisted by assessors. It would then, however, be said with considerable force that courts which are not good enough for motorists are not good enough for anybody. Our courts of summary jurisdiction as at present constituted are certainly not good enough for motorists. On the wider question I have expressed my views at length elsewhere (see *English Justice*, Chap. II).

The law as to negligence and contributory negligence with regard to damage caused by motor-cars is too technical to be dealt with here, and the layman must be content to leave it to his legal advisers. If he wishes to look it up for himself he may refer to

the case of Swadling *v.* Cooper (see *English and Empire Digest*, Supplement 8, Vol. 36, p. 12). The crucial question is, as stated by Viscount Hailsham, "Whose negligence was it that substantially caused the injury?" He cannot in any event alter the facts, and his advisers will see to his evidence, according to the tenderness or otherwise of their consciences.

It continually happens that solicitors are consulted by persons who have driven into unlighted vehicles standing on the road. They usually consider that they have a cast-iron claim for damages, and are indignant when they are advised to the contrary. The best-known illustration is that provided by the old case of Davies *v.* Mann in 1842 (see *English and Empire Digest*, Vol. 36, p. 113), where a man left a hobbled donkey in the highway, but recovered damages against a man who drove into the four-legged ass. It is obvious on consideration that a driver should be able to see a large stationary object and to stop before he runs into it. On special facts the position may be different, and the decision in the recent case of Tidy *v.* Bateman was on special facts which did not appear in the reports in the lay press. It is true that in that case the dependents of a motorist who was killed by running into a stationary obstruction were held entitled to recover, but in the case of Tidy *v.* Bateman the deceased motorist was following another car, which stopped on seeing the obstruction. The deceased avoided the car which had stopped and crashed into the obstruction (see *Law Journal* for 20th January, 1934). The very day after this case was decided a report of it in a lay paper was shown to me triumphantly by a client whom I had a week or two earlier advised not to take action against the owner of an unlighted stationary lorry he had run into.

There is one other warning to motorists, and that is to be very careful in buying cars in these days of hire-purchase. It is not generally realised that a car

bought from a person who was in possession of it on a hire-purchase agreement can be re-taken by the owner from the purchaser. It is true that in that event the buyer has a claim for the recovery of the purchase-money from the man who sold the car, but that is generally useless.

CHAPTER XII

DODGING THE LAW

It has been said that it is possible to drive a coach and four through any Act of Parliament. This is near enough the truth, but the gaps are often stopped by amending acts, with disastrous results to subsequent coaches. Dodging taxes is an ancient practice, and one which has grown largely in recent years.

Until the middle of the nineteenth century the smuggler was the principal tax dodger, and he appears to have been fairly successful. His methods, however, lacked subtlety. The smuggler did not so much evade the law as escape its officers. It is probable that a good deal of smuggling goes on at present in motor-boats and light craft of various kinds. It was not until the war brought really heavy taxation in its train that evasion became the fine art that it now is.

Excess Profits Duty was an ingenious device designed to prevent War Profiteering. To a large extent, however, it failed to do so, owing to various devices which are in danger of being forgotten. Roughly speaking, Excess Profits Duty was a heavy tax on the amount by which the profits of a company, firm or person exceeded their pre-war standard. Immense ingenuity was shown by lawyers and accountants in devising methods of evasion, of which concealment of profit by means of subsidiary companies, high salaries to all kinds of people, the acquisition of derelict businesses with potential future value and the renewal of plant and buildings were

the most popular. In mining districts you may hear stories of workings carried up to the beginning of profitable seams, and then abandoned until taxation was taken off. I have been told such things myself by men who had no possible motive for deceiving me, and whom I have found truthful in other respects.

The principal shareholder in a certain limited company hit upon a simple method of preventing too large a proportion of his profits reaching the Government. As is usual, the memorandum of association of his company was widely drawn, and included powers to carry on agriculture and acquire property. Accordingly, several farms were purchased, on which agricultural experiments were carried on at the expense of the revenue, while the managing director had a great deal of excellent shooting for nothing. In the smaller businesses which did not deal direct with the Government or with large contractors profits were concealed by a system of cash trading which was never entered in their books at all. In a surprisingly large number of instances I used to find that the purchasers of house property for some years after the war brought in the purchase-money in bundles of notes, not obtained from the bank, but brought direct from home, where it had reposed under beds or in all kinds of odd hiding-places. I remember one case where, after a man's death, several thousand pounds in one-pound notes were found concealed in various parts of his house. He was not a wealthy man, and the concealed money represented the greater part of his estate. The difficulties of the successful tax dodgers arose when they were called upon to explain their possession of recently acquired investments and properties, and often they found explanation an awkward matter. The most ingenious of these explanations was the betting account, which I believe to have been used in more than one instance. The man in question developed a taste for racing, and began to attend meetings. He also did a good deal

of betting otherwise, paying out quite openly by cheque when he lost, and paying in his winnings. The only thing about his betting that was in any way noticeable was that he nearly always won heavily at the big race meetings which he attended personally, bringing home his winnings in cash. He carried on his ordinary business as usual, and did not do enough betting to be assessed as a professional backer, even if the tax authorities had been prepared to take the risk of trying that course. In two or three years, however, he accumulated a good many thousand pounds by betting, and then suddenly gave it up altogether. The tax authorities did a lot of thinking, but that was all. Manipulating the stock sheets was another method of evading taxation. It was, however, limited by reason of the necessity of preserving some sort of relation between stock, sales, and purchases. In some instances stock had to be held so long before it was safe to sell that by the time it was realised its actual value had fallen to that which had been originally stated. Taking business premises of various kinds from interested parties at excessive rents was another method of distributing profits which would otherwise have gone to the Revenue. Occasionally the evasion of taxation and the accumulation of cash in a house led to embarrassing results. I remember a case in which I was concerned in which a very large sum in cash was stolen. The owner dared not reveal the extent of the loss, with the result that only a small proportion of the amount stolen was recovered, and the thieves must have done very well, although some of them were captured and convicted.

The high rate of income-tax and super-tax (surtax) has led to immense ingenuity being used to avoid payment thereof. The use of limited companies in various forms, and especially the distribution of assets as capital by going into liquidation, has been the form of evasion most used. The various Finance Acts and

the cases decided thereunder show a contest between the Inland Revenue and the tax dodger comparable to that which has been carried on between guns and armour-plate since iron-clad ships were invented. The methods used are highly technical and vary from time to time, but the Government can always win if it really wants to, for the Chancellor of the Exchequer is in the position of a card-player who can deal himself whatever hand he chooses after having had a look at his opponent's cards. It is doubtful whether the Estate Companies which certain great landowners have formed really effect as much avoidance of taxation as they are intended to do. Certain allowances can probably be increased and there may be some other loopholes, but it will be easy for any Government so inclined heavily to penalise these Estate Companies. Moreover, they furnish both an obvious argument and a convenient opportunity to land nationalisers. Income-tax is often evaded by living abroad, a course which appears to commend itself to many who profess the most ardent patriotism.

In connection with income-tax a grievance which is felt by many taxpayers is the fact that if they appeal against an assessment in the ordinary course they come before a body of commissioners which often includes trade competitors, customers, or creditors of their own. I have known a case where a practising solicitor was actually clerk to the commissioners. It is obvious that a serious conflict of interests may often have occurred when advising clients in his private practice.

The protection which is supposed by some newspapers to be afforded to the taxpayer by the commissioners is in most districts farcical. It is true that occasionally they decide against an inspector, almost always wrongly, but far too often a would-be appellant is deterred from appealing by the knowledge that his private circumstances will have to be disclosed to men he knows, often to business competitors.

I have often heard questions asked as to how so many bankrupts manage to live well and even luxuriously. The answer almost always is that they have taken advantage of the opportunities afforded by marriage. Fully to comprehend the position it is necessary shortly to explain our law of bankruptcy, which is only too well known to the average trader, but is not always understood by the general public.

Halsbury's *Laws of England* (2nd edition), Vol. 2, p. 4, says:

"Bankruptcy is a proceeding whereby the State takes possession of the property of a debtor by an officer appointed for the purpose, and such property is realised and, subject to certain priorities, distributed rateably amongst the persons to whom the debtor owes money or has incurred pecuniary liabilities."

Bankruptcy is now often taken advantage of by debtors to rid themselves of liability and enable them to make a fresh start. This is far from being its original purpose. Lord Ellenborough, then Chief Justice, said in 1806, in the case of Sutton *v.* Weeley (*English and Empire Digest*, Vol. 4, p. 11):

"The principle of bankruptcy laws, as it is to be found in 34 and 35 Henry 8, c. 4, is to prevent persons craftily obtaining into their hands great substance of other men's goods, and at their own wills and pleasures consuming the substance obtained by credit of other men, and it is always to be remembered that it is the protection of persons who have so given credit which is the professed object of bankruptcy laws."

And in 1744 Mr. Justice Abney remarked: "Bankruptcy ever was and yet is considered as a crime. It was anciently punished with corporal punishment" (see Tribe *v.* Webber, *English and Empire Digest*, Vol. 4, p. 12).

Yet in October 1933 a case came before the courts of a man who had three times been bankrupt and in no instance had obtained his discharge, and bankruptcy

is often used to obtain unfair advantages. The modern view is that the bankrupt should give up all his property to be divided among his creditors and then become free from his debts and be able to start again, provided he has committed no offence.

Very shortly, the course of bankruptcy proceedings is as follows. A bankruptcy petition may be presented either by a creditor or the debtor himself. There must be at least £50 due to the petitioning creditor or creditors, and what is called an act of bankruptcy must have been committed by the debtor. A debtor may also present a petition against himself or herself. In either case it is necessary to pay fees amounting to £13 10s. in the case of a creditor and £10 for a debtor. These are out-of-pocket payments to the court, and do not include any solicitors' costs. On the hearing of the petition, unless it is dismissed, a Receiving Order is made, and, unless the debts are paid in full or some composition or scheme is put forward and accepted by the creditors and the court, the debtor is shortly afterwards adjudicated bankrupt.

The result of bankruptcy is that all the property of the debtor, with certain exceptions, vests in a trustee, and the debtor is freed from further liability in respect of any debt provable in the bankruptcy. Until the bankrupt obtains his discharge, however, his trustee in bankruptcy may claim any property which vests in him, with practically no exception beyond the personal earnings of the bankrupt to an amount sufficient for the support of himself and his family. The reason for this exception is that it is not intended that the bankrupt should become a slave, but it often enables a bankrupt to live very comfortably, for it is in practice difficult for the trustee to intervene and get hold of any alleged surplus. A bankrupt who has not committed any offence under the bankruptcy laws usually gets his discharge at an early date and without much difficulty.

It is, however, with the evasion of the law that we are concerned. Suppose that a single man possessed of substantial means proposes to enter into some hazardous business. All he has to do to secure himself is to marry some woman whom he can trust and settle upon her in consideration of marriage such part of his property as he wishes to secure. The settlement, being in consideration of marriage, which is a valuable consideration according to the law, cannot be upset upon his bankruptcy however soon that may happen, provided that the wife be innocent of the fraud upon the creditors. Even a settlement made after marriage and without consideration may be good against the trustee in bankruptcy. Should the settlor become bankrupt within two years after the date of the voluntary settlement, it will be void against the trustee in bankruptcy, and should he become bankrupt within ten years from the settlement it will be void unless the persons claiming under the settlement can prove that the settlor at the time of making the settlement was able to pay his debts and liabilities in full without recourse to the settled property. Otherwise the settlement, which includes any kind of gift or transfer of property, is good against the bankrupt's creditors. Such a settlement is usually, but not necessarily, made upon a wife. It is by means of settlements of this kind that certain notorious bankrupts have been able to live luxuriously and defy their creditors.

To a man who lives by his personal earnings and does not need credit bankruptcy has few terrors, and provided he has or can obtain the necessary £10 he need not fear imprisonment for debt, the shadow which haunts the small debtor. Bankruptcy is often the easy refuge of people who ought to be compelled to pay. Not long ago I was concerned for the defence in an action for breach of promise of marriage brought against a young man earning about £3 a week. The proceedings were not commenced until nearly a year

after the engagement was broken off, just after the man's marriage to another girl, and they were obviously vindictive. The defence, which was successful, was that the engagement had been broken off by mutual consent, and the man was awarded costs against the unsuccessful plaintiff. She was earning a good weekly wage, and proceedings were taken against her in the County Court by way of judgment summons, which would undoubtedly have resulted in the man being paid at least some portion of his costs or the woman being committed to prison. She, however, had sufficient money to file her petition in bankruptcy, and the unfortunate man got nothing. This was a typical instance and I have been concerned in many similar cases. Assuming, however, in the instance quoted, that the woman had not possessed the money to file her petition, she would have had a committal order made against her for a small monthly amount which she would have had to pay or go to prison. It is often mentioned that a County Court judge may, upon the hearing of a judgment summons, instead of a committal order make a receiving order, but he can only do this with the consent of the judgment creditor and upon the creditor paying the necessary £10. The Judge cannot make an administration order where the debtor's liabilities exceed £50.

Bankruptcy not being available to the destitute debtor, his only way out is by means of an administration order, but this is almost always made conditional on his paying at least a proportion of his debts by instalments.

Another very effective way of evading one's liabilities is by dying, and it is surprising to what a large extent our law favours the dead as against the living.

The maxim *actio personalis moritur cum persona* often causes great hardship. For instance, where damage is caused by the negligent driving of a motor-car and the motorist who causes the injury is himself killed

the person injured is without remedy. He has lost his right of action against the motorist, for his claim is of the type which dies with the death of the person against whom the action would have been brought, and third party insurance does not help him, for the insurance company can only be attacked through the person insured.

There would be something to be said for the rule if it went the length of the saying of Meg Merrilees in *Guy Mannering*: "Dead! that quits a' scores." But it applies only to wrongful acts or defaults independent of contract, and apart from its origin in the complicated technicalities of our law, which gives the doctrine a certain historical interest, it has nothing to recommend it. Why should it be possible, for instance, for a man corruptly to induce the servant of another to give him orders, and then by dying to enable his representatives to keep his ill-gotten profits? It is to be hoped that the recently appointed Committee of Judges will see their way to recommending a change in the law.

There is another remarkable point arising out of the law with regard to torts which often enables a wrongdoer to escape paying for the damage he has caused. It is a very ancient rule of our law that where a liability arises from the wrongful act of several persons, each is liable for all the consequences. There was a reported case on this point as long ago as 1302 (see De Bodrengam *v.* Arcedekene, *English and Empire Digest*, Vol. 42, p. 975). But it is equally well settled that there is no contribution between them, and if the injured party gets judgment in an action against both, and recovers the whole damages from one, that one cannot recover from his fellow wrongdoer a proportion of what he has paid. (See Merryweather *v.* Nixan, *English and Empire Digest*, Vol. 42, p. 979). As Lord Herschell (then Lord Chancellor) said in the House of Lords in the course of his judgment in the

case of Palmer *v.* Wick & Pulteneytown Steam Shipping Company (see *English and Empire Digest*, Vol. 42, pp. 980–1):

"On principle, I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each co-debtor should not pay his share, or why, if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free by setting up his own wrong."

In deciding that the principle did not apply to the law of Scotland his Lordship further remarked that—

"It is now too late to question that decision (i.e. Merryweather *v.* Nixan, cited above) in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy which justifies its extension to the jurisprudence of other countries."

Apart from a purely technical point of law suggested by Lord Halsbury in the same case there does not seem to be anything to be said in favour of the doctrine of no contribution between joint wrongdoers. There has been a tendency on the part of judges to limit it as far as possible. It is, however, a very ancient rule, and notwithstanding the remarks of Lord Herschell in 1894 there has been no attempt on the part of the legislature to alter the law.

The power which arises under a Statute of Edward III of compelling a person to find sureties for good behaviour is a remedy which may be used as an instrument of oppression. It is to be hoped that this means of punishing persons because it is thought that they may be likely to commit an offence of some kind will before long be limited and defined. As Stone's *Justices Manual* (1933 edition) observes at p. 237, quoting from Burns' *Justice*: "The Statute of Edward has been so extended that it has become difficult to define how far it shall extend and where

it shall stop, and justices cannot exercise too much caution and good advisement."

I am a Conservative, and I find that members of my party are apt to forget that powers of this kind, including the immense powers given to the executive when the Courts Emergencies Powers are put in force and the various possibilities under the doctrine of Public Mischief, as recently expounded, are capable of being used by any party which can get into office. Law which is uncertain and indefinite is a dangerous thing, and most dangerous to the party of law and order.

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